Petition

IN THE
SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1981

NO. 81 6301

TIMOTHY GEORGE BALDWIN, Petitioner

vs.

FRANK C. BLACKBURN Warden
Louisiana State Penitentiary, and
WILLIAM J. GUSTE, JR., Attorney
General, State of Louisiana, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 28, 1982

QUESTIONS PRESENTED FOR REVIEW

I. Whether an evidentiary hearing upon petitioner's claims of ineffective and unprepared counsel was mandated by the holding in Townsend v. Sain, 372 U.S. 293 (1963).

II. Whether the proportionality review of death sentences on less than a statewide basis can eliminate that possibility of aberrant and capricious sentence so decried under Furman v. Georgia, 408 U.S. 238 (1972).

III. Whether the de facto compacting of Louisiana's bifurcated guilt and sentencing trial phases deprived petitioner of a fair determination of his guilt or innocence.

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IN THE
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NO. _____

TIMOTHY GEORGE BALDWIN, Petitioner

vs.

FRANK C. BLACKBURN, Warden,
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General, State of Louisiana, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Timothy George Baldwin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 14, 1981.

OPINION BELOW

The opinion of the Court of Appeals in Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981) appears in the appendix hereto. The opinion of the District Court for the Western District of Louisiana, though not reported, is also included in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1981. A timely petition for rehearing en banc was denied on Ocotber 2, 1981. Petitioner sought and was granted extensions totalling sixty days for the filing

of this petition. (See A-402 and A-554.) The Court's jurisdiction is therefore invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the Sixth Amendment, Fourteenth Amendment, 28 U.S.C. §2254, Louisiana Code of Criminal Procedure art. 905.9, Louisiana Supreme Court Rule 28, and La. Rev. Stat. 14:30 and 14:30.1. The full text of each is included in the appendix.

STATEMENT OF THE CASE

Petitioner Timothy Baldwin was indicted for the first degree murder of one Mary James Peters. Timothy Baldwin, his wife, and their seven children were neighbors of Mary James Peters in West Monroe, Louisiana, from 1971 until 1977. With two hangers-on, Marilyn Hampton and William Odell Jones, the family moved from Monroe to Ohio. Jones, Hampton, the petitioner, and three of his children left Ohio and travelled through the south, with the two men earning money from odd jobs. In Florida, they rented a black van and on April 4, 1978, the petitioner and Ms. Hampton drove the van to West Monroe, while Jones and the children stayed at a cabin in a Mississippi state park. Petitioner and Ms. Hampton visited one of petitioner's older children in West Monroe, but left there around eight in the evening. Shortly thereafter, a van resembling that of the petitioner was seen parked in front of Mrs. Peters' house. A man and woman were observed leaving the residence between ten and eleven that night. Shortly before their departure, passersby saw and heard indications that someone in the Peters' home was being beaten. Petitoner testified in his own behalf, and admitted that he and Ms. Hampton visited the victim that evening, but denied the murder. Mrs. Peters, who was 85 years old, was beaten with various things, among them a skillet, a stool and a telephone. She remained on the kitchen floor overnight and was discovered the next morning by an old-age worker bringing her noon meal. She was semi-comatose and irrational when brought to the hospital; the following day, she

died of massive cerebral hemorrhage and swelling, secondary to external head injuries.

Petitioner and Marilyn Hampton were arrested across the state line in El Dorado, Arkansas. From the van they were driving were recovered certain objects belonging to the victim. Various members of the petitioner's family and his friend, Odell Jones, testified as to inculpatory statements made by the defendant. As might be expected from any visit, the petitioner's finger and palm prints were found in the victim's home, on a cigarette lighter, a television set, and a coffee cup.

The Louisiana statutes in effect at the time of the offense were a confusing mix, as amendments to the second degree murder statute (La. R.S. 14:30.1) had amended by implication the first degree murder statute (La. R.S. 14:30). As interpreted in State v. Payton, 361 So. 2d 866 (La. 1978), first degree murder included every specific intent homicide committed in the presence of one or more statutory (La.C.Cr.P. art. 905.4) aggravating circumstance; the finding of an aggravating circumstance beyond a reasonable doubt was not only necessary for a verdict of guilty as charged, but could also then authorize imposition of the death penalty in the sentencing phase. Second degree murder was defined as any felony murder and any specific intent homicide committed in the absence of aggravating circumstances.

The trial court, as to specific intent homicides, charged the jury that the presence of statutory aggravating circumstances distinguished first from second degree murder; the jury was not told what these aggravating circumstances were, and neither counsel appears to have noticed this omission. The jury found the defendant guilty as charged, and in a sentencing hearing made the binding recommendation that the death penalty be imposed. The Louisiana Supreme Court affirmed petitioner's conviction and sentence, (State v. Baldwin, 388 So.2d 664 (La. 1980)) reviewing the sentence to determine only whether it was out of line with sentences in other capital cases in the same jurisidiction.

This Court denied certiorari. Baldwin v. Louisiana, ___U.S.___, 101 S.Ct. 901, 66 L.Ed. 2d 830 (1981). After summary denials of his habeas petition in the state courts, petitioner filed the habeas application culminating in this petition for certiorari.

ARGUMENT

I.

WHETHER AN EVIDENTIARY HEARING UPON PETITONER'S CLAIMS OF INEFFECTIVE AND UNPREPARED COUNSEL WAS MANDATED BY THE HOLDING IN TOWNSEND V. SAIN, 372 U.S. 293 (1963).

The Sixth Amendment guarantees to the accused the right to the assistance of counsel in every criminal prosecution. This Court has emphasized that the Sixth Amendment right is one to adequate legal assistance. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Petitioner has asserted that his trial counsel was inadequate, but has been denied an evidentiary hearing for the resolution of his claims. Petitioner asserted his counsel was ineffective as demonstrated by the failure to develop trial strategy consistent with petitioner's version of the events, and the failure to adequately investigate petitioner's story.

Since Townsend v. Sain, 372 U.S. 293 (1963), this Court has never retreated from the proposition that an evidentiary hearing is required in federal court unless the state courts have, after full hearings, reliably found the relevant facts. Townsend, 372 U.S. at 312-12; cf. Sumner v. Mata, 449 U.S. ____(1981). In Townsend the petitioner was convicted of murder in the Illinois state courts, in great part because of a confession. Though he alleged the confession was involuntary because he was under the influence of narcotics at the time the confession was given, the state trial court denied his motion to suppress. Only when the petitioner sought collateral relief was it first mentioned that one of the narcotics administered by a police physician (to combat withdrawl symptoms) could also perform as a "truth serum." Despite this new allegation, the lower federal courts denied petitioner a hearing. In remanding for an evidentiary hearing, this Court identified several situations in which such a hearing was mandated.

Among them, of course, was that situation in which the material facts have not been adequately developed at any state hearing.

In Blackledge v. Allison, 431 U.S. 63 (1977), another occasion arose in which the principles of Townsend had to be applied. Allison had pled guilty in state court to charges of attempted safe robbery carrying from ten years to life in prison. As part of the plea, Allison had submitted a printed waiver of rights form on which he had responded "no" to an inquiry concerning the existence of any promises or threats inducing a plea. After receiving a sentence of seventeen to twenty-one years in prison, Allison filed for state post-conviction relief claiming that he had been promised a sentence of ten years, but told to deny it on the waiver form or the plea could not be accepted. The state courts summarily denied relief, holding that the waiver form was determinative of the issue. The federal district court, upon a magistrate's recommendation, denied relief when Allison proved unable to produce affidavits from alleged witnesses in support of his allegations. The Fourth Circuit Court of Appeals remanded for a hearing, but this Court granted the state's petition for a writ of certiorari. This Court affirmed the holding, stating again that the standard is that an evidentiary hearing is to be granted

> when the allegations are such that, if proved, the petitioner would be entitled to relief, and issue of fact is raised which cannot be resolved simply on the basis of an affidavit from a prosecutor denying the allegations.

431 U.S. at 72-73. Cf. Machibroda v. United States, 368 U.S. 487 (1962).

In the case at bar, Baldwin's trial attorney voir dired the prospective jurors as to their willingness to accept an intoxication defense. Presumably intoxication would have been used as a defense to any evidence of a specific intent. See La. R.S. 14:15; State v. Godeaux, 378 So.2d 941 (La. 1979). By this questioning, however, defense counsel gave the distinct impression

that his client had in fact committed the acts alleged by the prosecution. When the petitioner took the stand at trial, he specifically denied being drunk on the night in question; his recollection was clear that he had passed by the victim's house, left her in fine health, and then proceeded to El Dorado, Arkansas. Defense counsel failed to corroborate this alibi in any way; a motel receipt showing defendant's presence at the motel that night was not discovered by defense counsel until he bothered corresponding with the motel manager some five months after the trial.

Proper preparation of the defense would have disclosed that an intoxication defense was untenable. The abandonment of the intoxication claim found counsel unprepared to advance any defense at all. Consultation with the petitioner could have averted this major pitfall of inculcating the jury with the idea that though petitioner had committed the deed, he was not fully responsible for his actions. The failure to consult and prepare a defense accordingly could have been fully demonstrated at an evidentiary hearing.

The Townsend court reasoned that because detention obtained through a violation of fundamental rights

> is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence must never be totally foreclosed.

Townsend, 372 U.S. at 211. Cuyler v. Sullivan, reaffirming as fundamental the right to adequate legal assistance, is meaningless to a petitioner denied and evidentiary hearing despite the promise of Townsend.[1]

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[1] The denial of an evidentiary hearing by the Court of Appeals for the Fifth Circuit is not only contrary to the rule established by this Court, but also a deviation from the many cases in which the Fifth Circuit had declared that "informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are the cornerstone of effective assistance of counsel. "Gaines v. Hopper, 575 F.2d 1147 (5 Cir. 1978). Rejection of one course of action may be made only after the alternatives have been explored; the adoption of a clearly untenable defense requires an evidentiary hearing to determine whether the alternatives had been explored. Beavers v. Balkcom, 636 F.2d 114 (5 Cir. 1981); accord, Rummel V. Estelle, 590 F.2d 103 (5 Cir. 1979).

II.

WHETHER THE PROPORTIONALITY REVIEW OF DEATH SENTENCES ON LESS THAN A STATEWIDE BASIS CAN ELIMINATE THAT POSSIBILITY OF ABERRANT AND CAPRICIOUS SENTENCES SO DECRIED IN FURMAN V. GEORGIA, 408 U.S. 238 (1972).

The Louisiana scheme for appellate review of the proportionality of death sentences will never eliminate the possibility of arbitrary and capricious verdicts. In a system which reviews verdicts in capital cases only to determine whether the verdicts in any given judicial district are consistent one with the other, the Louisiana Supreme Court had only to compare petitioner's sentence with that rendered in two of the hundreds of first degree murder cases prosecuted in Louisiana. The review scheme misses the very real possibiltiy that petitioner would never have been sentenced to death if tried in a different district.

Article 905.9 of the Louisiana Code of Criminal Procedure directs the state supreme court to "review every sentence of death to determine if it is excessive." The procedure for such a review was left for the court to establish. Rule 28 of the Supreme Court of Louisiana was accordingly adopted; in Rule 28 the state supreme court set as its responsibility consideration of "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." As an aid to this review, the district attorney whose office has obtained a capital verdict is directed to file a sentence review memorandum which must include:

> i. A list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and synopsis of the facts in the record concerning the crime and the defendant.
>
> ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,
>
> iii. any other matter relating to the guidelines in Section 1.

Rule 28, Sec. 4(b).

The heart of petioner's claim is that comparative sentence review on less than a statewide basis fails to satisfy the Supreme Court's mandates for a constitutional sentencing scheme. Support for such a claim is drawn from a review of the capital cases decided by this Court.

The touchstone of the plurality opinion in Furman v. Georgia, 408 U.S. 238 (1972) was that the death penalty "could not be imposed under sentencing procedures inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976). Most of the concurring opinions relied upon the scarcity of death sentences for the conclusion that the infliction of capital punishment was arbitrary.

It was in an effort to control fortuitous circumstances that many states enacted mandatory penalty statutes of the sort found unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976). That same year, however, the Court found constitutional a trio of sentencing schemes. See Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). In these three cases not only was the statutory guidance to the jury found to carry great constitutional weight, but the right to an automatic appeal also lent credibility to the state's claim that its system eliminated the capriciousness objected to in Furman. The Georgia scheme called for statewide review; in Florida, the state supreme court apparently demonstrated its willingness to assume a proportionality review duty no statute or regulation imposed. Proffitt v. Florida, 438 U.S. at 258-59. While the Texas scheme under examination in Jurek also failed to provide specifically for proportionality review, this Court found that

> by providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational and consistent imposition of death sentences under law.

Jurek v. Texas, 428 U.S. at 276.

Most of the states permitting imposition of the death penalty have established statewide proportionality review schemes. A cursory review of the state legislation reveals that Louisiana is the only jurisdiction in which a statute or regulation specifically restricts the state supreme court to an examination of sentences from a geographical subdivision smaller than the state itself.[2] In Beck v. Alabama, 447 U.S. 625 (1980), this Court found that the value as a procedural safeguard of a rule guaranteeing a defendant an instruction on lesser included offenses (where warranted by the evidence) was demonstrated by its "nearly universal acceptance" by state and federal courts. The Rule 28 review by the Louisiana Supreme Court is by regulation and in practice[3] a district-wide review; by forbidding itself to examine sentencing practices beyond the judicial district's borders, the Louisiana Supreme Court reduces itself to a "district" Supreme Court. In no sense is this task the equivalent of that performed

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2. In State v. White, 395 A.2d 1082 (Del. 1978), the Delaware Supreme Court directed that "counsel for the state, together with amicus and other persons as may be appointed by the Court, shall, at state expense, compile a list and description of similar cases." Idaho Code §19-2827(g) directs that state's supreme court to "collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975." Kentucky Revised Statute 532.075(6) directs an administrative assistant to the state courts to accumulate the records of all felony cases in which the death penalty was imposed after January 1, 1970. Massachusetts, in Mass. Stat.Ann. 279:56(4), makes it the responsibility of the executive secretary to amass all first degree murder cases in which sentence was imposed after January 1, 1980, or such earlier date as the high court may set. Missouri statute 565.014 directs that supreme court to provide an attorney and staff to compile facts on all capital cases in which sentence was imposed after May 26, 1977. The Nebraska legislature expressed its concern that the law might not be applied uniformly throughout the state, Neb.Rev.Stat. 29.2521.01(3), and therefore in Rev.Stat. 29.2521.01 asked for a compilation not just of all murder cases, but of all homicide cases. Tenn.CodeAnn. §39-2402 directs that court to compile a list of all the cases in which a person is tried for first degree murder, irrespective of the punishment. Finally, Va.Code §17.110.1 requires the state court to accumulate the records of all capital felony cases.

Though the states may vary in requirements, only Louisiana has instructed its court to ignore cases of which it could otherwise take notice.

3. The review was only district-wide in every Louisiana affirmance of a death penalty. See, e.g., State v. Prejean, 379 So.2d 240 (La. 1979); State v. Monroe, 397 So.2d 1258 (La. 1981); State v. Williams, 383 So.2d 369 (La. 1980); State v. Martin, 376 So.2d 300 (La. 1979); State v. Baldwin, 388 So.2d 679 (La. 1980); State v. Mattheson, ____ So.2d ____ (La. 1981).

by the Texas Court of Criminal Appeals and examined in Jurek.

The review demands only consistency within the district. The danger thus exists that district A juries could sentence to death one hundred persons for a specific crime; district B juries trying one hundred persons for murders with facts identical to those in district A might sentence one person to death, and ninety-nine to life imprisonment. Under Rule 28 review for internal consistency, every sentence in district A would be affirmed on proportionality grounds, while the sole death sentence in district B would be reversed on proportionality grounds. No facts would differ, but one hundred in district A would march to execution, a fate suffered by none in district B.

Instead of the two cases used as the baseline in the case at bar, the Louisiana Supreme Court, with a statewide review, might have compared petitioner's case with those from other judicial districts. The Court would then have found that juries seldom impose the death penalty, even in cases where the facts reveal rather brutal armed robberies.[4]

In Furman v. Georgia, though the Court's members may have disagreed as to the evidence, each justice concurred in the sentiment that a law arbitrarily ordering the execution only of those convicted from a certain group would fall as unconstitutional. If the Court is to permit a review demanding only consistency within a judicial district, there is a threat

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4. For example, in State v. Ford, 375 So.2d 641 (La. 1979), the defendant was convicted of first degree murder and sentenced to life though the evidence indicated that he had slowly tortured his victim by repeatedly shooting the victim when he refused to jump off an overpass. In State v. Harris, 383 So.2d 1 (La. 1980), a jury recommended a life sentence for each of three counts of first degree murder (committed separately) whre the victims had been repeatedly stabbed, one even seventy-seven times. In State v. Sylvester, 388 So.2d 1155 (La. 1981), a life sentence was recommended on two counts of an execution-style slaying of prospective witnesses for a narcotics trial. In State v. Bodley, 394 So.2d 584 (La. 1981), a jury recommended life for the defendant found guilty of stabbing the elderly lady caring for him, and then amputating her legs. In State v. Roubion, 407 So.2d 691 (La. 1981), a jury recommended life for a defendant convicted of stabbing and shooting his girlfriend's former lover, and then cutting off the victim's legs before burning the body. Finally, in State v. Albert Lewis, ___ So.2d ___ (La. 1981), a jury recommended life for two defendants found guilty of anally, orally and vaginally raping a seventy-four year old widow, then stabbing her over two hundred times with an ice pick, paring knife and metal fork before crushing her skull with a brick and kicking in her ribs.

that what could never be done legislatively will now be done judicially.[5] For these reasons, petitioner respectfully requests that a writ of certiorari issue.

III.

WHETHER THE DE FACTO COMPACTING OF LOUISIANA'S BIFURCATED GUILT AND SENTENCING TRIAL PHASES DEPRIVED PETITIONER OF A FAIR DETERMINATION OF HIS GUILT OR INNOCENCE.

Since this Court decided its trilogy of capital cases in 1976, the states have uniformly complied with due process dictates by adopting bifurcated trial procedures in capital cases. The Louisiana legislature concurred in that appraisal, but the courts in this case deprived petitioner of the opportunity for a dispassionate consideration of his fate when there occurred a de facto condensation of his trial into a single hearing. Though the jury was told there was a difference between first and second degree murder, it was not asked to draw the line until asked whether the death penalty should be imposed.

In 1976, the Louisiana legislature defined first degree murder as any homicide committed with specific intent to kill or to commit great bodily harm. Second degree murder (for which the death penalty was not authorized) comprised only standard felony murders. During the 1977 legislative session, the second degree murder statute was amended to include not only felony murders, but also any specific intent homicide committed without the presence of an aggravating factor listed in La. C.Cr.P. art. 905.4. (This article listed those aggravating factors which a jury was to consider after a finding of guilt of first degree murder, and one of which was necessary before a sentence of death could even be considered by the jury.) The confusing situation caused by this implied amendment or restriction of the scope of the first degree murder statute was not addressed

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5. The proportionality review issue was presented for the first time in the Fifth Circuit in Williams v. Blackburn, 649 F.2d 1019 (5 Cir. 1981). Though the appeal from the denial of a writ of habeas corpus was denied, Williams again raised the issue in his suggestion for a rehearing en banc. The en banc rehearing was granted, 661 F.2d 1020 (5 Cir. 1981), the issue was again briefed, and the case is presently under consideration by the Fifth Circuit.

by the Louisiana Supreme Court before its opinon in State v. Payton, 361 So.2d 866 (La. 1978). In Payton (which was not finalized until three weeks after petitioner's trial) it was held that the statutory scheme required the state to prove an aggravating circumstance beyond a reasonable doubt as an element of first degree murder.

Without the benefit of Payton, the trial court charged the jury and neglected to charge this element, or to differentiate first and second degree murder:

> The defendant in this case is charged with having committed first degree murder, which is one of the forms of homicide declared unlawful. Homicide is the killing of a human being by the act, procurement or culpable omission of another. First degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. The specific intent referred to in this definition is the criminal intent necessary here. Specific criminal intent is the state of mind which exists when the circumstances indicate that the offender actively desire that the prescribed criminal consequences follow his act or failure to act. First degree murder is a capital offense meaning that if the defendant is found guilty of that offense the Jury is given the authority to make a binding recommendation as to whether the sentence shall be death or life imprisonment without benefit of probation, parole or suspension of sentence. Any such recommendation would occur in the second phase of the trial which would follow a finding of guilty of first degree murder. In this stage and at this time you're only . . . your only function is to determine the guilt or innocence of the defendant. Since two of the responsive verdicts you will be considering here are second degree murder and manslaughter, it's necessary that we define these crimes. Revised Statute 14:30.1 provides, "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated battery, aggravated kidnapping, aggravated escape, armed robbery or simple robbery, even though he has no intent to kill or . . . the killing of a human being when the offender has a specific intent to kill under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

Transcript of State v. Baldwin, 1130-31. Nor was the distinction between first and second degree murder argued to the jury by either counsel.

After finding the defendant guilty of first degree murder,

the jury was told that imposition of the death penalty would demand finding an aggravating circumstance beyond a reasonable doubt.

Because the death penalty is qualitatively different from every other kind of punishment, this Court has closely scrutinized the procedures under which juries deliberate both guilt and sentencing. See Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977). In Beck the Court analyzed an Alabama prohibition on instructing the jury about lesser-included offenses when the crime charged was capital murder. Both the state and the defendant speculated as to whether this would influence a jury to convict though an element of the crime was missing, but fearing the defendant's release into society, or to follow the oath as jurors and acquit if proof of an element were lacking. The Court rejected the state's contention, holding that the element of uncertainty introduced was intolerable, and that it could not indulge in the presumption that any mistake by the jury would be corrected by the trial judge.

The case at bar cries for the same logic. The jurors were not asked if they could find an element of first degree murder until they were asked whether they wished the defendant executed. The introduction of the emotional life-or-death discussion into what should have been a dispassionate examination of the state's case on the defendant's guilt or innocence muddied the waters. The statutory separation of the functions in a bifurcated trial was rendered meaningless and the petitioner was thus deprived of a fair consideration of his guilt or innocence. What should have been a carefully-determined element of the crime was reduced to no more than a check-off box on the way to recommending death. If, indeed, as Beck held, the universality of a procedural protection is a measure of its worth, then the petitioner's conviction cannot stand.

For this reason, petitioner respectfully requests that the Court grant certiorari in his case.

CONCLUSION

Petitioner was deprived of a dispassionate consideration of his guilt when the trial court in effect reduced the bifurcated hearing to a single one determining both guilt and punishment. Deprived by the court of a fair trial, he was also deprived by counsel of an adequate defense. Petitioner now seeks a remand for a hearing to consider the adequacy of representation at the guilt phase of his trial, and a new consideration of his sentence.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

A true copy
Test: GILBERT F. GANUCHEAU
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FEB 24 1982

U.S. COURT OF APPEALS
FILED
OCT 2 1981
GILBERT F. GANUCHEAU
CLERK

No. 81-3249

TIMOTHY GEORGE BALDWIN,

Plaintiff-Appellant,

versus

FRANK C. BLACKBURN, Warden, Louisiana State Penitentiary, and WILLIAM J. GUSTE, JR., Attorney General, State of Louisiana,

Defendants-Appellees.

- - - - -

Appeal from the United States District Court for the Western District of Louisiana

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/14/81, 5 Cir., 1981, _____F.2d_____).

(OCTOBER 2, 1981)

Before WISDOM, GEE and POLITZ, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX B

Amendment VI of the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV of the United States Constitution:

" * * *. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

La. R.S. 14:30 (1976) defined first degree murder as

"First degree murder is the killing of a human being when the offender has a specific intent to kill or to commit great bodily harm."

La. R.S. 14:30.1 (1977) in pertinent part described second degree murder as

"(B). The killing of ahuman being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure."

La. Code of Criminal Procedure Article 905.4 provides that

"The following shall be considered aggravating circumstances:

(a)The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner."

Louisiana Code of Criminal Procedure Article 905.9 provides that

"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules sahll establish such procedures as are necessary to satisfy constitutional criteria for review."

Louisiana Supreme Court Rule 28 provides, in pertinent part, "Section 4.

* * *

(b) The district attorney shall file othe memorandum on behalf of the state withi the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,

iii. any other matter relating to the guidelines in Section 1."

Timothy George BALDWIN,
Petitioner-Appellant,

v.

Frank C. BLACKBURN, Warden, Louisiana State Penitentiary, and William J. Guste, Jr., Attorney General, State of Louisiana, Respondents-Appellees.

No. 81-3249.

United States Court of Appeals,
Fifth Circuit.
Unit A

Aug. 14, 1981.

Louisiana prisoner who was sentenced to death sought federal habeas relief. The United States District Court for the Western District of Louisiana, Nauman S. Scott, Chief Judge, denied relief without evidentiary hearing, and petitioner appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) failure to pursue intoxication defense did not constitute ineffective representation; (2) failure to move for new trial on ground of newly discovered evidence, i. e., motel receipt, was not ineffective representation; (3) violation of state sequestration laws was of no constitutional moment; (4) there was "cause" for failure to contemporaneously object to failure to charge that one of the statutory aggravating circumstances must be found as an element of first-degree murder; (5) fact that instructions on aggravated circumstances were given in the wrong step of bifurcated guilt/sentencing procedure was not shown to be unfair; and (6) although Louisiana Supreme Court's scrutiny of death penalty is directed initially to those murder cases within a given judicial district, its review is not limited to such.

Affirmed.

1. Criminal Law ⇐641.13(1)

Effective assistance of counsel is not tantamount to errorless assistance or counsel judged ineffective by hindsight and methodology for applying the effectiveness standard involves inquiry into actual performance of counsel and a determination based on totality of the circumstances and the entire record. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐641.13(1)

Tactical decisions do not render counsel's assistance ineffective simply because in retrospect it is apparent that counsel chose the wrong course. U.S.C.A.Const. Amend. 6.

3. Habeas Corpus ⇐50

It was not error for district court to deny evidentiary hearing on habeas corpus claim of ineffective assistance of counsel where petitioner did not raise allegations that required reference outside the record. U.S.C.A.Const. Amend. 6.

4. Habeas Corpus ⇐50

Where petitioner can point to specific incidents of ineffectiveness of counsel, a new trial or a habeas hearing will be ordered; however, habeas courts are not required to blindly accept speculative and inconcrete claims. U.S.C.A.Const. Amend. 6.

5. Habeas Corpus ⇐85.2(1)

Burden of proof is on the petitioner in a habeas corpus proceeding.

6. Criminal Law ⇐641.13(2)

Counsel was not ineffective for failure to pursue intoxication defense where

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defendant precipitated abandonment of such defense when he testified on cross-examination that he was fully conscious of his activities on night of murder and counsel's only asserted alternative strategy would have been to pursue an arguable alibi defense. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐641.13(2)

Petitioner was not deprived of effective assistance of counsel because of failure to move for new trial based on newly discovered evidence, i. e., motel receipt indicating that defendant was in a motel some 70 miles away on night of murder, where defendant testified that he left victim's house and drove to a motel in subject city on night of offense but did not assert that motel receipt indicated a check-in time inconsistent with his presence in victim's house at apparent time of the offense. U.S.C.A.Const. Amend. 6.

8. Habeas Corpus ⇐45.2(2)

In habeas proceedings, the federal court sits to determine whether there has been a constitutional infraction of petitioner's due process rights that would render the trial as whole fundamentally unfair, not to enforce state procedural rules.

9. Habeas Corpus ⇐85.1(1)

Prejudice is assumed in habeas cases only when pretrial publicity is so pervasive and expressly prejudicial that community is prejudiced.

10. Criminal Law ⇐1134(1)

Standard of review, at least on direct appeal, is stricter for publicity during trial than for pretrial publicity, and principles from the two types of cases must not be allowed to overlap haphazardly.

11. Constitutional Law ⇐267

Juror exposure to news accounts of the crime with which defendant is charged does not, alone, presumptively deprive defendant of due process. U.S.C.A.Const. Amends. 5, 14.

12. Habeas Corpus ⇐59

Habeas corpus hearing on claim of due process violation because of pretrial publicity was not required where petitioner had not demonstrated and record did not suggest such degree of prejudicial pretrial publicity as would support a presumption of prejudice based on newspaper story mentioning a safe, the significance of which allegedly was unknown to general public, a prepsychiatric stress test and petitioner's volunteering to take a lie detector test over counsel's objections. U.S.C.A.Const. Amends. 5, 14.

13. Habeas Corpus ⇐90

Allowing jurors to go to concession stand in courthouse lobby during trial, possibly unescorted, was not so presumptively prejudicial as to require evidentiary hearing in habeas corpus proceeding.

14. Habeas Corpus ⇐90

Failure to instruct last seven jurors not to discuss the case with anyone was not a federal constitutional violation warranting evidentiary hearing in federal habeas proceeding. U.S.C.A.Const. Amends. 5, 14.

15. Constitutional Law ⇐258(1)

While decision to punish certain conduct as a state crime and the determination of the constituent elements of such crimes are largely left to the legislatures and courts of the various states, due process requires that convictions under those laws not be arbitrarily or confusedly obtained. U.S.C.A.Const. Amends. 5, 14.

16. Habeas Corpus ⇐30(1)

If instructions are likely to cause imprecise, arbitrary or insupportable finding of guilt a defendant may be entitled to habeas relief. U.S.C.A.Const. Amends. 5, 14.

17. Habeas Corpus ⇐30(1)

Although, in violation of Louisiana contemporaneous objection rule, no trial objection was lodged to failure to charge that one of the statutory aggravating circumstances must be found as an element of first-degree murder, petitioner had not waived claim for purpose of federal habeas proceeding where although offense was committed during period when governing Louisiana *Payton* decision was effective, *Payton* was decided but one month prior to trial and was not published until after rehearing, which was three months after trial ended. LSA–R.S 14:30, 14:30.1(B); LSA–C.Cr.P. arts. 841, 905.4, 922, subd. D; LSA–C.C. arts. 2166, 2167.

18. Constitutional Law ⇐268(11)

Although Louisiana trial court's charge on first-degree murder did not indicate that at least one aggravating circumstance must be found as an element of such offense there was no due process violation where same jury was directed to find aggravated circumstances in sentencing portion of capital penalty trial and jury unanimously found two such circumstances, one of which, i. e., perpetration of offense during armed robbery, was sufficient for first-degree murder conviction; fact that instructions on aggravated circumstances were given in wrong step of bifurcated guilt/sentencing procedure was not shown to be unfair. LSA–R.S. 14:30, 14:30.1(B); LSA–C.Cr.P. art. 905.4.

19. Habeas Corpus ⇐45.2(2)

Before an ailing instruction warrants federal habeas corpus relief the instruction must be found to have so infected entire trial that the resulting conviction violated due process. U.S.C.A.Const. Amends. 5, 14.

20. Homicide ⇐311

Although Louisiana trial jury was never specifically told that if even one juror held out at sentencing phase the trial judge would be required to impose a life sentence, such requirement was sufficiently clear in view of instruction that if jurors did not unanimously find existence of any statutory aggravating circumstance then life imprisonment was the only sentence that could be imposed. LSA–R.S. 14:30, 14:30.1(B); LSA–C.Cr.P. art. 905.4.

21. Homicide ⇐354

Although Louisiana Supreme Court's scrutiny of death penalty cases is directed initially to those murder cases within a given judicial district, its review is not limited to such thereby rendering less than statewide proportionality review unconstitutional and, in any event, case was a peculiar one from which to launch an attack on proportionality review procedure where petitioner was convicted of brutally beating to death an elderly woman with several blunt instruments in order to steal her possessions. LSA–C.Cr.P. art. 905.9.1; La.Supreme Court Rules, Rules 28, 28, § 4, 8 LSA–R.S.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM, GEE and POLITZ, Circuit Judges.

GEE, Circuit Judge:

The facts in this case, as elaborated by the Louisiana Supreme Court on direct appeal, *State v. Baldwin*, 388 So.2d 664, 669 (La.1980), are not in dispute.

Facts

Timothy Baldwin, his wife Rita, and their seven children were neighbors of Mary James Peters in West Monroe, Louisiana, from 1971 until 1977. Mrs. Peters was godmother to their youngest, Russell. During the latter part of their stay in West Monroe, William Odell Jones also resided with the Baldwins. The group went to Bossier City for six months and then moved to Ohio. The oldest daughter, Michelle, remained in West Monroe with one brother. A second son entered the service. Marilyn Hampton and her three daughters stayed with the Baldwins in Ohio. Marilyn, Timothy Baldwin, and her children then left, accompanied by Jones. Baldwin and Jones worked together in the business of installing aluminum siding. After the departure of her husband, Rita Baldwin got in financial difficulties and was picked up on bad check charges. Her four younger children went to live with Michelle in West Monroe. Meanwhile, Timothy Baldwin, Jones, Marilyn Hampton and her three children led an itinerant existence. Their last means of transportation was a 1970 black Ford van, rented in Tampa, Florida.

On April 4, 1978, Marilyn Hampton and Timothy Baldwin drove the van to West Monroe. Jones and the children stayed at a cabin in Holmes State Park, near Jackson, Mississippi. Baldwin and Marilyn Hampton visited Michelle's apartment in West Monroe but left there around 8:00 p. m. Shortly thereafter, a van was seen parked in front of Mrs. Peters' house. A man and woman were observed leaving the residence between 10:00 and 11:00 p. m. Shortly before their departure, passersby saw and heard indications that someone in the Peters' home was being beaten. Baldwin testified in his own behalf and admitted that he and Marilyn visited Mrs. Peters that evening but denied the murder. Mrs. Peters, who was 85 years old, was beaten with various things, among them a skillet, a stool, and a telephone. She remained on the kitchen floor overnight and was discovered the next morning shortly before noon by an employee of the Ouachita Council Meals on Wheels, who was bringing her noon meal. Although helpless and incoherent, Mrs. Peters tried to defend herself against the police officers and the ambulance attendant who took her to the hospital. Dr. A. B. Gregory saw her in the emergency room around 12:30 p. m. on April 5, 1978, and found her semi-comatose. Her left cheekbone and jawbone were shattered; she had brain damage from multiple contusions and lacerations. According to Dr. Gregory, Mrs. Peters could not communicate rationally. She died of the injuries the following day. Dr. Frank Chin, who performed the autopsy, attributed her death to massive cerebral hemorrhage and swelling, secondary to external head injuries.

Timothy Baldwin and Marilyn Hampton were subsequently located in El Dorado, Arkansas. Timothy Baldwin signed consents for the search of their motel room and the van. Two blue bank bags, one empty and one containing savings bonds and certificates of deposit payable to Mary James, were found in the van.[1]

1. Mary James was the victim's name prior to her last marriage.

Jones, to whom Marilyn Hampton and Timothy Baldwin had made inculpatory statements both before and after the crime, helped police officers locate a safe that had belonged to the victim in the LaFourche Canal in West Monroe. Baldwin's finger and palm prints were found on various items in the Peters' home: a cigarette lighter, a television set, and a coffee cup.

Baldwin was found guilty, and the jury recommended the death sentence, finding two aggravating circumstances: "1. the offender was engaged in the perpetration or attempted perpetration of an armed robbery [appellant had a knife on his person] and 2. the offense was committed in an especially heinous, atrocious or cruel manner." The Louisiana Supreme Court affirmed the conviction and denied rehearing. The United States Supreme Court denied certiorari on January 12, 1981. *Baldwin v. Louisiana*, —— U.S. ——, 101 S.Ct. 901, 66 L.Ed.2d 830 (1981). Appellant's execution was scheduled for March 31, 1981. He then sought post-conviction relief, which was denied for lack of jurisdiction by the state district court on March 26, 1981, and denied by the Louisiana Supreme Court without written reasons on March 27, 1981. Appellant immediately filed a petition for writ of habeas corpus in federal district court and was granted a stay of execution on March 27, 1981. The district court denied relief without an evidentiary hearing and ordered the stay dissolved as of May 4, 1981.

Denial of Effective Counsel

Appellant asserts that the district court erred in finding, without holding an evidentiary hearing, that trial counsel was not ineffective. This issue was not raised on direct appeal but was raised in appellant's state petitions for post-conviction relief and denied without a hearing. Appellant first argues that counsel was ineffective for failing to pursue a consistent defense strategy, asserting that counsel's questioning on voir dire evidenced an intent to pursue an intoxication defense, which was not developed at trial and was abandoned in the jury charge.

Before trial, counsel moved to change the plea to guilty by reason of insanity based in part on appellant's heavy drinking. *See State v. Baldwin*, 388 So.2d at 670. Counsel questioned prospective jurors about their understanding of the concept of specific intent and their feelings about alcohol consumption. Counsel's opening and closing remarks are not included in the transcript, and their content is unknown; but appellant did cross-examine two state witnesses about their knowledge of appellant's increasing use of alcohol over the years and his extensive drinking on the day of the murder. Appellant's wife was called to testify about his increasing use of alcohol, and appellant testified at length about his drinking on the day of the murder. On cross-examination, appellant admitted that, although drunk, he was fully conscious of his activities on the night of the murder. Counsel subsequently agreed to deletion of the intoxication defense from the jury charge. Counsel then argued on motion for new trial that appellant's mental state or intoxicated condition precluded specific intent. *See id.* at 676. As the state asserts, appellant also defended on the theory that he had visited in the victim's home but left without committing the murder.

[1, 2] The Sixth Amendment entitles a criminal defendant to counsel reasonably likely to render and rendering reasonably effective assistance. Effective assistance is not tantamount to errorless assistance

or counsel judged ineffective by hindsight. The methodology for applying the standard involves an inquiry into the actual performance of counsel and a determination based on the totality of the circumstances and the entire record. *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981). "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149 (5th Cir. 1978). But tactical decisions do not render assistance ineffective simply because in retrospect it is apparent that counsel chose the wrong course. *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981).

[3] The district court below considered "the evidence, the character of the defendant, and the circumstances of the crime." It noted that Baldwin had been represented by two experienced criminal lawyers who engaged in three months of pretrial preparation, numerous substantive motions, a five-day trial, and extensive post-trial litigation. The district court found counsel reasonable effective and refused to scrutinize counsel's decision not to develop further the intoxication defense. We conclude that it was not error for the district court to deny an evidentiary hearing while finding that counsel's assistance at trial had been effective. This court has remanded for an evidentiary hearing when it could not conclusively determine from the record the accuracy of a petitioner's allegations of ineffective assistance. *See Clark v. Blackburn*, 619 F.2d 431, 432 (5th Cir. 1980). "The district court should hold a full hearing on any issues not resolved because of an insufficient record." *Id.* at 434. Here appellant does not raise allegations that require reference outside the record. *Compare Harris v. Oliver*, 645 F.2d 327, 331 (5th Cir. 1981) (record presented sharp conflicts of evidence requiring credibility choices), *with Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981) (evidentiary hearing unnecessary since district court had full record).

[4-6] Where a petitioner can point to specific incidents of ineffectiveness, this circuit does not hesitate to grant a new trial or a hearing, but it does not blindly accept speculative and inconcrete claims. *United States v. Gray*, 565 F.2d 881, 887 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). Here appellant has failed to produce evidence to support a federal constitutional deprivation. The burden of proof is on the petitioner in a habeas corpus proceeding. *Jones v. Estelle*, 632 F.2d 490, 492 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1992, 68 L.Ed.2d 307 (1981). Appellant's case was difficult to defend, considering the evidence of fingerprints in the victim's home, the victim's property found in appellant's van, and the testimony of Jones that appellant had said he would kill the victim if necessary in order to get her money. Appellant precipitated the abandonment of the intoxication defense when he testified on cross-examination that he was fully conscious of his activities on the night of the murder. Counsel's only asserted alternative strategy would have been to pursue an "arguable defense of alibi." This alibi defense is discussed below and is without merit. Appellant has failed to meet his burden of alleging facts to support the grant of an evidentiary hearing. *See Rutledge v. Wainwright*, 625 F.2d 1200, 1205 (5th Cir. 1980), *cert.denied*, —— U.S. ——, 101 S.Ct. 1746, 68 L.Ed.2d 229 (1981).

[7] The second basis for appellant's assertion of ineffective assistance of

counsel is counsel's failure to move for a new trial despite newly discovered evidence. Five months after trial, counsel acquired a motel receipt indicating that appellant was in El Dorado, Arkansas, some 70 miles away, on the night of the murder. The district court did not investigate this allegation, simply assuming that counsel would have developed any adequate alibi defense after exerting the effort to uncover the evidence. Although under other circumstances the failure to grant a hearing on this allegation might have constituted error, our review of the record indicates that appellant's counsel did not further develop the new evidence probably because it did not provide the appellant with an adequate alibi. Appellant testified at trial that he left the victim's house and that he and Mrs. Hampton drove to an El Dorado motel that night. Appellant does not assert that the motel receipt indicates a check-in time inconsistent with appellant's presence in the victim's house between 10:00 and 11:00 p. m., the time of the murder. *State v. Baldwin*, 388 So.2d at 669. Even if this court were inclined to second guess appellant's trial counsel, this allegation is without merit.

Violation of State Sequestration Laws

Appellant asserts that the trial judge did not instruct the last seven jurors concerning sequestration and allowed the jurors to go to a concession stand in the courthouse lobby during trial, possibly unescorted. After the first day of voir dire, the court excused the remaining prospective jurors for the night, noting the existence of publicity about the case and instructing them not to expose themselves to any information that might influence them. The court then addressed the five selected jurors and instructed them not to discuss the case with anyone, listen to any discussions, or discuss the case among themselves. The record does not conclusively indicate whether the entire panel heard the last instruction. The following morning, defense counsel moved to have the remaining panel members polled concerning a newspaper article about the case. The story mentioned a safe, the significance of which was unknown to the general public, a pre-psychiatric stress test, and appellant's volunteering to take a lie detector test over his counsel's objections. Appellant's request was granted, and the remaining panel members were individually asked, out of the presence of the selected jurors, whether they had read the story. The trial court then found that three of the sixteen panel members had come into contact with some form of news media and that those three stated they did not have a different opinion after the exposure and that the jury panel had not been tainted by the exposure. Appellant's counsel stated no objection to this ruling, and it is not challenged on appeal. Appellant admits that no objection was made to the failure to instruct the last seven jurors concerning sequestration or their trip to the concession stand.

[2] Appellant's exclusive reliance on Louisiana's strict sequestration requirements in capital cases is misplaced. In habeas proceedings, the federal courts sit to determine whether there has been a constitutional infraction of the appellant's due process rights that would render the trial as a whole "fundamentally unfair," not to enforce state procedural rules. *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981). "[F]ederal habeas corpus relief is available only for the vindication of rights existing under federal law; not rights existing solely under the rules of state procedure." *Id.* at 905–

06; *Stewart v. Estelle*, 634 F.2d 998, 999 (5th Cir. 1980). "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, indifferent jurors.'" *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) (quoting *Irvin v. Dodd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

[9-13] Appellant asserts no prejudice from the brief jury separation and appears to request an evidentiary hearing in order to ascertain whether prejudice existed. Prejudice is presumed in habeas cases only when pretrial publicity is so pervasive and expressly prejudicial that the community is prejudiced. *United States v. Williams*, 568 F.2d 464, 469 (5th Cir. 1978) (direct appeal discussing confusion of federal and constitutional standards); *United States v. Herring*, 568 F.2d 1099, 1103 (5th Cir. 1978) (direct appeal consciously applying due process principles). The standard of review, at least on direct appeal, is stricter for publicity during trial than for pretrial publicity, and principles from the two types of cases must not be allowed to overlap haphazardly. *Williams*, 568 F.2d at 468. Juror exposure to news accounts of the crime with which defendant is charged does not, standing alone, presumptively deprive the defendant of due process. *Murphy v. Florida*, *supra* 421 U.S. at 799, 95 S.Ct. at 2035. Appellant has not demonstrated and the record does not suggest such a degree of prejudicial pretrial publicity as would support a presumption of prejudice. *See Mayola v. State of Alabama*, 623 F.2d 992, 996-98 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1966, 68 L.Ed.2d 303 (1981) (appellant seeking nullification of conviction must demonstrate an "actual, identifiable prejudice attributable to that publicity on the part of members of his jury"). Appellant has shown no constitutional violation in the jurors' trip to the concession stand. Indeed, it has been held that the decision to sequester the jury lies within the sound discretion of the trial court. *Mastrain v. McManus*, 554 F.2d 813, 818 (8th Cir.), *cert.denied*, 433 U.S. 913, 97 S.Ct. 2985, 53 L.Ed.2d 1099 (1977) (denial of motion to sequester jury in first degree murder case; no state requirement involved).

[14] Appellant's other allegation of error, failure to instruct the last seven jurors not to discuss the case with anyone, must also fail absent alleged prejudice. *Rotolo v. United States*, 404 F.2d 316 (5th Cir. 1968) (failure of trial judge to admonish jury not to discuss case prior to lunch recess did not constitute reversible error absent allegation of actual prejudice). Appellant has thus failed to allege a federal constitutional violation, and the denial of his petition on this basis without evidentiary hearing was not error.

Jury Instructions on Substantive Crime

[15, 16] The appellant next challenges the jury instructions. In brief, the appellant argues that the instructions given the Louisiana jury that convicted and sentenced him to death were inaccurate, confusing and incomplete, thus denying him due process. He argues that the instructions substantially undermined the reliability of the jury's determinations and created an impermissible risk that the jury had not found every element of the crime beyond a reasonable doubt. This claim presents a more difficult issue than those discussed above. While the decision to punish certain conduct as a state crime and the determination of the constituent elements of such crimes are

largely left to the legislatures and courts of the various states, due process requires that convictions under those laws not be arbitrarily or confusedly obtained. If the instructions given the jury were likely to cause an imprecise, arbitrary, or insupportable finding of guilt on the charge of first degree murder, then the defendant may be entitled to habeas relief. The legal background for the appellant's claim must be explained.

Spurred by the United States Supreme Court decision in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), holding that Louisiana's efforts to reinstitute the death penalty consistent with the principles of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), had failed, the State of Louisiana amended its statutes on murder and its capital sentencing procedures in 1976 and 1977. First degree murder was defined at the time of the appellant's trial as a homicide committed with specific intent to kill or to inflict great bodily harm. La.R.S. 14:30. Second degree murder was then defined in part as "the killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure." La.R.S. 14:30.1(B) (1977). Those "aggravating circumstances," the absence of which negatively defined second degree murder, normally played a role in the second part of the first degree murder trial. Once a defendant was found guilty of murder in the first degree, a sentencing hearing was held before the convicting jury. If the jury unanimously found at least one of article 905.4's aggravating circumstances (defendant engaged in perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; victim a firefighter or a peace officer on duty; defendant previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping; defendant knowingly created a risk of death or harm to more than one person; defendant was offered or given anything of value for commission of crime; defendant at time of offense was imprisoned for another unrelated forcible felony; offense was committed "in an especially heinous, atrocious or cruel manner"), it could, but did not have to, unanimously impose the death penalty; alternatively, the jury could unanimously choose life imprisonment. If the jury could not reach unanimity on the sentence, the trial judge was obligated to impose a life sentence on the defendant. Much of the above scheme is still in place in Louisiana, but the state supreme court opinion in *State v. Payton*, 361 So.2d 866 (La.1978), and the consequent statutory amendments have altered the definitions of first and second degree murder.

In its *Payton* opinion, the Louisiana Supreme Court purported to decide what the state legislature had really meant in its statutory definitions of murder. "By defining second degree murder as an unaggravated, specific intent homicide, the legislature clearly intended by implication to remove this type of conduct from the definition of first degree murder and to redefine the capital offense as a specific intent homicide accomplished with a statutorily prescribed aggravating circumstance." *Id.* at 870. All seven of the aggravating circumstances prescribed in article 905.4 for consideration of imposition of the death penalty were not properly, despite the language of the second degree murder statute, to be considered as part of the proof of first degree mur-

der. The conviction of a defendant of other violent crimes was not a circumstance related to the commission of the homicide and thus was not a circumstance whose showing was sufficient for a finding of first degree murder. Also, the particular heinous or cruel nature of the crime, while related to the offense at issue, was deemed intolerably prejudicial to the fair determination of guilt/innocence. The court, then, redefined first degree murder in Louisiana as a homicide committed with a specific intent to kill or inflict great bodily harm with the presence of one or more of the remaining aggravating circumstances in article 905.-4. *Id.* at 872.

The sentencing stage remains the same as before *Payton*. At this stage the jury still focuses on all the aggravating circumstances, including prior convictions for unrelated murder, aggravated rape, or aggravated kidnapping, and the "heinous, atrocious or cruel" nature of the offense in order to determine punishment. As mentioned above, the legislature has amended the statute to comply substantially with the court's opinion.

Under *Payton*, then, a Louisiana jury finding that a defendant committed a homicide with the intent to kill or inflict great bodily harm would, absent a finding of one of the aggravated circumstances, result in conviction of murder in the second, not the first, degree. In this case the trial judge instructed the jury as follows:

> First degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm.... First degree murder is a capital offense meaning that if the defendant is found guilty of that offense the jury is given the authority to make a binding recommendation as to whether the sentence shall be death or life imprisonment without benefit of probation, parole or suspension of sentence. Any such recommendation would occur in the second phase of the trial which would follow a finding of guilty of first degree murder. In this stage and at this time your only ... function is to determine the guilt or innocence of the defendant. Since two of the responsive verdicts you will be considering here are second degree murder and manslaughter, it's necessary that we define these crimes. Revised Statute 14:30.1 provides, "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated battery, aggravated kidnapping, aggravated escape, armed robbery or simple robbery, even though he has no intent to kill or ... the killing of a human being when the offender has a specific intent to kill under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure....

Nowhere in the charge are the elements of article 905.4 indicated. Nor does the charge indicate that one of the aggravating circumstances must be found as an element of first degree murder. The appellant challenges the instruction for this failure to include an essential element of first degree murder and for not clearly defining second degree murder.

[17] Although the jury charge was not objected to at trial and Louisiana has a contemporaneous objection rule, La. Code Crim.P. art. 841; *Tyler v. Phelps*, 643 F.2d 1095, 1100 (5th Cir. 1981), this is not fatal to the appellant's claim. The

principles of comity and federalism that prevent federal courts from granting habeas relief to state prisoners whose claims are unreviewable in state courts because of failure to object, give way where there is cause for the procedural default and actual prejudice from the error. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The appellant convincingly explains his failure to object, pointing to the judicial change in the definition of first degree murder in Louisiana through the *Payton* case. *Payton* was decided on June 30, 1978, a month prior to the appellant's trial, but was not published until after rehearing on August 18, 1978, three weeks after the trial had ended. The offense was committed April 4, 1978, during the period when the *Payton* decision was effective. *Compare with State v. Berry*, 391 So.2d 406, 409 and 412 (La. 1980) (*Payton* applicable to crime committed January 30, 1978); *State v. Esker*, 380 So.2d 19, 27 (La.), *cert. denied*, —— U.S. ——, 101 S.Ct. 133, 66 L.Ed.2d 57 (1980) (*Payton* inapplicable because offense committed prior to effective date of statute construed by *Payton*). As the appellee admits at one point in its brief, appellant's counsel could not have anticipated this decision; appellant's failure to object at trial is thus understandable. Even if the *Payton* decision had been disseminated prior to trial, it would not have become final until action on the petition for rehearing. The criminal code provides: "If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied." La.Code Crim.P. art. 922(D) (1981). The official revision comments state that the code provisions were amended to conform to the provisions of the Code of Civil Procedure, articles 2166 and 2167, which are virtually identical. Here rehearing was granted, and the original opinion was slightly modified. Although neither code speaks to the granting of a rehearing, articles 2166 and 2167 have been interpreted as meaning that the original decree of a court of appeal never attains the status of a final judgment if it is modified or reversed on rehearing; the decree on rehearing is considered the final judgment. *Consolidation Loans, Inc. v. Guercio*, 356 So.2d 441, 442 (La.App. 1977). Appellant has therefore established "cause" for purposes of *Wainwright v. Sykes*. *See Jimines v. Estelle*, 557 F.2d 506, 511 (5th Cir. 1977).

[18, 19] The appellant, however, fails to demonstrate any harm resulting from this irregularity in the instructions. "Before a federal court may grant relief under 28 U.S.C. § 2254 based on alleged error in a state trial court's unobjected to charge, the error must be so egregious as to rise to the level of a constitutional violation or so prejudicial as to render the trial itself fundamentally unfair." *Bryan v. Wainwright*, 588 F.2d 1108, 1111 (5th Cir. 1979). The ailing instruction itself must so infect the entire trial that the resulting conviction violates due process. *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). Although the jury in this case was not directed to make the necessary finding of aggravated circumstances in order to find the defendant guilty of first degree murder, the same jury was directed to find aggravated circumstances in the sentencing portion of the trial. The jury unanimously found two aggravating circumstances in the course of its decision to impose the death penalty: the heinous nature of the crime and its commission during the perpetration of an armed robbery. Since *Payton* prohibited considera-

tion of the heinous nature of the offense in the guilt portion of the trial as an element of first degree murder, 361 So.2d at 871, the jury's first finding is irrelevant. The jury's second finding, however, would have been sufficient for a conviction of first degree murder under *Payton*.

Presumably, the danger the appellant points to here would be a conviction absent "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Kibbe*, 431 U.S. at 153, 97 S.Ct. at 1736, *citing In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Still, as this circuit has often pointed out, "actual prejudice, or its absence, must be determined by the facts and circumstances of each case." *Thomas v. Estelle*, 587 F.2d 695, 698 (5th Cir. 1979). Despite the valiant attempts of counsel, we fail to see how the fact that instructions on aggravated circumstances were given in the wrong step of a bifurcated guilt/sentencing procedure proved unfair to the defendant. In the sentencing charge, the court properly defined armed robbery: "Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another by use of force or intimidation, while armed with a dangerous weapon." The state did not introduce any evidence of aggravating factors in the sentencing portion of the trial but relied on the evidence of armed robbery developed during the guilt/innocence phase, without indicating what that evidence was.

The victim was bludgeoned to death with objects from her own home, including a skillet, a stool, and a telephone. *State v. Baldwin*, 388 So.2d at 669. "Dangerous weapon" is defined as an "instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." La.R.S. § 14:2(3). "The term 'dangerous weapon' is not limited to those instrumentalities which are inherently dangerous, but includes any instrumentality 'which in the manner used, is calculated or likely to produce death or great bodily harm.'" *State v. Bonier*, 367 So.2d 824, 826 (La.1979). The evidence at trial included two stool legs, part of a telephone, and pieces of a skillet, analysis of which by an expert criminologist detected blood and hair that matched the blood type and hair samples of the victim. There was also evidence that, prior to the murder, appellant had stated his intent to rob the victim and to kill her if necessary in order to take her money. The record therefore contains overwhelming evidence that the offense was committed during the perpetration of an armed robbery. This record was not added to, except in mitigation, at the time of sentencing.

The jury's combined findings in the guilt and sentencing portions of the trial permitted the imposition of the death penalty on appellant. The aggravating circumstance that led them to the imposition of this punishment existed regardless of when the jury was instructed to consider it, and it was necessarily a part of their determination of guilt. What the appellant objects to and what is really at stake here is not his conviction but his punishment. There is no denying that when punishment was finally imposed on the defendant, at the end of his trial, the jurors had been properly instructed on everything necessary to determine their verdict and had found it all beyond a reasonable doubt.

Jury Instructions on Sentencing

Appellant alleges error in the court's failure clearly to instruct the jury that

should they be unable to reach a unanimous recommendation of either life or death, then the trial court would be obliged under the law to impose a life sentence. There is no dispute that the jury was informed that the sentence they wished to impose—whether life imprisonment or death—had to be unanimous under Louisiana law. The appellant argues that the jury was not clearly told, however, of the judge's duty to impose a life sentence should even one jury member refuse to join in a sentencing verdict. According to the appellant, this failure introduced an unacceptable level of risk that the jury might erroneously impose a death penalty. Appellant cites *State v. Williams*, 392 So.2d 619 (La.1980), where the Louisiana Supreme Court found a failure to give such an instruction to be constitutional error.

[20] We disagree with the appellant's allegation of lack of clarity. The trial court told the jury at the sentencing stage:

> [I]f you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, you are authorized to consider imposing a sentence of death; if you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, then life imprisonment without benefit of probation, parole or suspension of sentence is the only sentence that may be imposed.

Although the jury was never specifically told that if even one member of the jury held out, the trial judge would be required to impose a life sentence, we believe that the above words to the jury made this sufficiently clear.[2]

District-wide Proportionality Review

[21] The Louisiana Code of Criminal Procedure requires the state supreme court to review every death sentence to see if it is an excessive penalty in the particular case. La.Code Crim.P. 905.9. In pursuit of that duty, procedures have been formulated in Rule 28 of the Rules of the Supreme Court of Louisiana that require review in each case of the other death sentences imposed in that same judicial district since 1976. The appellant argues that comparative sentence review on less than a statewide basis is not a constitutionally valid sentencing scheme. Appellant purports to derive this principle from cases like *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

The argument made is unconvincing. The appellant's brief effectively gives the argument away: "*The opinions of the Supreme Court make it clear that the lack of any express provision for proportionality review is not fatal to the validity of a death penalty statute*; however, there still must be an assurance that the death penalty is being administered in a reasonably consistent manner throughout the state for a statute to pass constitutional muster." (emphasis added). The United States Supreme Court has approved various states' systems of appellate review to insure evenhanded disposition of cases imposing the death penalty, but the Court has never put forth any

2. We do not purport to pass on the appellant's argument that a predeliberation jury instruction on the consequences of failure to reach jury unanimity on sentencing is always required, even in cases with no jury deadlock. *Compare with State v. Williams*, 392 So.2d at 634 and 640.

one system as sacrosanct. The Constitution is concerned with the elimination of caprice, and the Louisiana approach insures "that the death penalty is being administered in a reasonably consistent manner throughout the state." The Louisiana scheme to promote evenhanded, rational, and consistent imposition of death sentences provides for a court with statewide jurisdiction to review each case where the sentence has been imposed and, in turn, satisfy itself that the sentence was not "imposed under the influence of passion, prejudice or any other arbitrary factors, whether the evidence supports the jury's finding of a statutory circumstance, and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." La.Code Crim.P. 905.9.1; La. Supreme Court R. 28. The court further requires the district attorney to file a list of all first degree murder cases occurring within his district having occurred since January 1, 1976, with a synopsis of its facts, the crime convicted of, and sentence imposed. La. Supreme Court R. 28 § 4. This is in addition to the court's knowledge, jurisdiction, and review of all other murder cases throughout the state. Thus, though the court's scrutiny is directed initially to those murder cases within a given judicial district, the review is not limited to such.

Furthermore, the facts of this case make it a peculiar one from which to launch an attack on the state's proportionality review procedures. Appellant was convicted of brutally beating to death an elderly woman with several blunt instruments in order to steal her possessions. It is doubtful that any conceivable method of proportionality review would show the death penalty here to be excessive or to have been arbitrarily or capriciously imposed. A justice of the Louisiana Supreme Court, who shares the appellant's sentiments on the constitutionality of the Louisiana procedures, made the same point in his concurrence in *State v. Baldwin*, 388 So.2d at 678:

> I remain of the belief that our scheme for review of the proportionality of the imposition of the death penalty is constitutionally flawed in not mandating statewide review of the sentences imposed in similar cases. *See State v. Prejean*, 379 So.2d 240, 249 (La.1980) (dissenting from denial of hearing). However, the extraordinary deliberateness and brutality of this murder of an 84-year-old woman for her valuables clearly justifies the death penalty without need of extensive comparison with other offenses.

For the above reasons, the district court's denial of relief is AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

TIMOTHY GEORGE BALDWIN

versus

FRANK C. BLACKBURN, Warden, Louisiana State Penitentiary, and WILLIAM J. GUSTE, JR., Attorney General, State of Louisiana

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NAUMAN S. SCOTT
CHIEF UNITED STATES DISTRICT JUDGE

ATTEST: A TRUE COPY
DATE: Apr 28 1981
ROBERT H. SHEMWELL, CLERK

BY: [signature]
Deputy Clerk, U.S. District Court
Western District of Louisiana

OPINION

Best Copy Available

I. BACKGROUND

Timothy George Baldwin was convicted by a jury in the Fourth Judicial District Court, Ouachita Parish, Louisiana, of first degree murder for the robbing and heinous beating to death of an 85 year old woman. The attack was effectuated by the use of various objects in the victim's home. She was found semi-counscious the next morning and taken to a nearby hospital where she died the following day of head injuries. At the sentencing phase of the trial, the jury found two statutory aggravating circumstances,[1/] considered the statutory mitigating circumstances and unanimously recommended the death penalty - a verdict binding upon the trial court. This process comports with Louisiana Code of Criminal Procedure art. 905 *et seq.*

Baldwin's conviction and sentence were appealed to an affirmed by the Louisiana Supreme Court. *State v. Baldwin*, 38 So.2d 664 (La. 1980). Petitioner's execution was stayed by th court pending an appeal to the United States Supreme Court, which denied the Writ of Certiorari *Baldwin v. Louisiana*, ____U.S.____, 66 L.Ed.2d 830 (1981), and Petition for Rehearin *Baldwin v. Louisiana*, ____U.S.____, No. 80-5751 (March 2, 1981 The stay was dissolved. Thereafter, the trial court signed

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1/ The statutory lists of aggravating and mitigating circumstances were presented to the jury as provided for in Louisian Code of Criminal Procedure, arts. 905.3, 905.4, 905.5. The tw aggravating circumstances unanimously found by the jury were t ". . . the offender was engaged in the perpertration or attemp perpetration of . . . armed robbery" and ". . . the offense wa committed in an especially heinous, atrocious, or cruel manner . .". Louisiana Code of Criminal Procedure, art. 905.4(a) and (g) respectively.

Baldwin's death warrant and set the execution for March 31, 1981, between 12:00 o'clock midnight and 3:00 o'clock A.M. Baldwin then filed an application for a Stay of Execution and an Application for a Writ of Habeas Corpus in the Fourth Judicial District Court. These applications were denied for lack of jurisdiction on March 26, 1981. An Application for a Stay of Execution and for Review of an Application for Post-Conviction Relief were denied by the Louisiana Supreme Court without written reasons on March 27, 1981. Baldwin next sought a stay of execution and an Application for Writ of Habeas Corpus under 28 U.S.C. § 2254 on March 27, 1981, before this court.

Considering the time constraints[2/] and the facial substantiality of petitioner's claims, we stayed the execution pending our determination of the merits. See *Rosenburg v. United States*, 346 U.S. 271, 288, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953) (*per curiam*); *see also Evans v. Bennett*, 440 U.S. 1301, 99 S.Ct. 1481, 59 L.Ed.2d 756 (1979); *Shaw v. Martin*, 613 F.2d 487, 491-492 (4th Cir., 1980).

II. STANDARDS OF REVIEW

In *Sumner v. Mata*, ____U.S.____, 66 L.Ed.2d 722 (1981), the Supreme Court elucidated the reviewing posture of a federal

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2/ As a description of our quandry, we quote from Justice William Renquist in *Evans v. Bennett*, 440 U.S. 1301, 99 S.Ct. 1481, 59 L.Ed.2d 756 (1979): "There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a 'hydraulic pressure' which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last-minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession. Such an explanation is not a condition of the granting of this or any further stay, but the absence of it will be taken into consideration by me." *Evans v. Bennett, supra*, at 1307.

> "We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 - if the settled procedural prerequisites for such a claim have otherwise been satisfied - an applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (footnote omitted). *Jackson v. Virginia, supra,* at 324.

Based upon the record and the nature of petitioner's claims, no evidentiary hearing is necessary. See *Spinkellink v. Wainwright,* 578 F.2d 582, 590 (5th Cir., 1978).

III. THE CLAIMS

Several arguments raised by Baldwin fall under the rubric of "ineffectiveness of counsel" and represent mixed questions of law and fact. *U.S. v. Gray,* 565 F.2d 881, 887, n. 18 (5th Cir., 1978), *cert. denied* 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). The Fifth Circuit construes effectiveness of counsel as "counsel (that) is reasonably likely to render and (does) render reasonably effective counsel" considering the federal habeas court's ". . . inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based upon the totality of the circumstances and the entire record." *U.S. v. Gray, supra,* at 887. *See Beavers v. Balkom,* 636 F.2d 114 (5th Cir., 1981). Counsel's performance need not be errorless to satisfy a defendant's Sixth Amendment rights. *Kemp v. Leggett,* 635 F.2d 453 (5th Cir., 1981); *Beavers v. Balkom, supra,* at 3449; *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir., 1960), *modified* 289 F.2d 928 (5th Cir., 1961), *cert. denied* 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). Frivolous or generalized grievances in this vein warrant no consideration by a federal habeas court. *See Sumner v. Mata, supra,* at 732; *see also U.S. v. Gray, supra.*

habeas court under § 2254(d):

> ". . . the findings made by the state court system 'shall be presumed to be correct' unless one of seven conditions specifically set forth in § 2254(d) (is) found to exist by the federal habeas court. If none of those seven conditions (are) found to exist, or unless the habeas court concludes that the relevant state determination is not 'fairly supported by the record', 'the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court (is) erroneous' (emphasis supplied)." (Footnote omitted). *Sumner v. Mata, supra,* at 733.

See *Cuyler v. Sullivan,* ____U.S.____, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The *Sumner* court made it clear that a 'hearing' on a state prisoner's habeas petition by a state trial or appellate court requires an adversarial airing of the issues but no set procedures. *Sumner v. Mata, supra,* at 730-731; *see Germany v. Estelle,* 639 F.2d 1301 (5th Cir., 1981). The state court's factual determinations are sufficient if evidenced by ". . . a written finding, written opinion or other reliable and adequate written indicia." *Sumner v. Mata, supra,* at 730-731; 28 U.S.C. § 2254(d).

The petitioner has exhausted his state remedies regarding the many claims presented to us. Most, but not all, of these claims have been decided with written findings by the Louisiana Supreme Court. The petitioner's burden of proof is not as great where no written findings support a state court's habeas decision. For both categories of claims we have endeavored to thoroughly investigate the record of the case. However, our disposition of the latter group of issues necessarily entails a more independent degree of findings under *Sumner* and the language of § 2254(d). We then are guided by the dictates of *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

At the outset we note that Baldwin was represented by two experienced criminal lawyers. Their work included three months of pretrial preparations during which time numerous substantive motions were urged, a five day trial and extensive post-trial litigation. Considering the evidence, the character of the defendant and the circumstances of the crime, we are compelled to find that Baldwin's counsel were effective enough to pass constitutional muster.

Baldwin raises two arguments that seek to undercut counsel's overall trial work - their failure to develop an alibi defense or proof of intoxication. Baldwin also points out counsel's ineffectiveness in not moving for a new trial after evidence allegedly corroborating his alibi became known.

Counsel looked into the possible alibi that Baldwin was at a motel 70 miles from Monroe at the time of the offense. He continued his investigative efforts up to 5 months after the trial, until receiving information from the motel regarding Mr. Baldwin's reservations there on the night in question. It is not the province of this court to second-guess counsel. Obviously, had an adequate alibi defense been available, it would have been developed; and had new "evidence" been of value, counsel would not have ignored it having secured the information after several months.

As for the mitigating circumstances of Baldwin's intoxication, some evidence related to drinking was elicited at trial. This court will not scrutinize counsel's decisions in choosing not to develop that evidence further. Nor will we judge such experienced counsel by hindsight, *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir., 1981); *Lovett v. Florida*, 627 F.2d 706 (5th Cir., 1980), even if ". . . in retrospect it is apparent that counsel chose the wrong course." *Beckham v. Wainwright*, *supra*, at 265; *see Akridge v. Harper*, 545 F.2d 457 (5th Cir., 1977).

Possible defenses are almost without number. Every case has a theory of defense. Certainly counsel is not obligated to file every available defense regardless of merit, nor is he obligated to introduce evidence in support of or to clutter or confuse the record with reasons why he chose not to utilize every defense. No record could withstand such scrutiny.

Two arguments attacking counsel's performance focus on the absence of an investigation and presentation of a "psychiatric defense" or "psychiatric evidence of mitigating value." The Louisiana Supreme Court did not make written findings on effectiveness of counsel. However, its determination that the evidence adequately showed Baldwin to be sane and in no way mentally impaired during commission of the offense bears on the effectiveness issue. *State v. Baldwin, supra,* at 670, 676 and 678.[3/]

> "The evidence does not establish that defendant was too intoxicated to realize what he was doing at the time the crime was committed, and there is ample evidence of the requisite specific intent at the time the crime was committed." *State v. Baldwin, supra,* at 676.

We view *Sumner* as applicable here and find that the record and both state courts' decisions relative to Baldwin's state of mind reveal these claims to be without merit.

3/ Psychiatric experts describe Baldwin as a "socio-pathic personality, anti-social type" who has a "character disorder". *State v. Baldwin, supra,* at 678. The record shows him to be of high intelligence. A defense theory based upon insanity would have been at best frivoulus and at worst, damaging to Baldwin.

The defense relied to some extent upon a theory that Baldwin was a heavy drinker, though not thoroughly intoxicated at the time the offense was committed. The trial court reasonably found this to be insufficient grounds to allow him to change his plea from "not guilty" to "not guilty and not guilty by reason of insanity". See Louisiana Code of Criminal Procedure, art. 561. That court also refused to appoint a sanity commission to evaluate the defendant. See Louisiana Code of Criminal Procedure, art. 643. Defense counsel made genuine efforts to investigate a psychosis-type theory and presented as well as the situation allowed, the only evidence of mitigating value available. Compare *Beavers v. Balkom, supra.*

Baldwin asserts counsel were ineffective in failing to develop and present evidence of bloodstains on his clothing that would disclose his innocence. This poses the question of whether the evidence presented at trial supported a finding of guilt beyond a reasonable doubt. No written findings were made on this point but under the *Jackson* test of the record we conclude every element of capital murder to have been proven beyond a reasonable doubt. We find no error of constitutional proportions.

Defense counsel brought a Motion for Change of Venue based upon adverse, inflammatory media coverage of the offense to be tried. A full hearing disclosed that no prejudice was found to exist in the community. The trial and appellate courts found that Baldwin's jury was impartial. *State v. Baldwin, supra,* at 669-670; Supreme Court Record (hereinafter referred to as "Record"), at Vol. 1, p. 215. There is no merit to petitioner's allegations that counsel's efforts in seeking a change of venue were deficient.

Baldwin questions defense counsel's successful challenge for cause of a prospective juror (Spatafora) who expressed an objection to the death penalty per se. Spatafora also expressed a bias favoring the testimony of Police Officers. We are confident that had this prospective juror not been challenged, Baldwin would assert that counsel were ineffective as well in light of the police-bias. Although the state did not challenge Spatafora, counsel's decision cannot be adjudged as constitutionally ineffective, if ineffective at all. Both state courts' findings of an impartial jury persuade us to dismiss this assertion.

Baldwin cites another incident of ineffective counsel - their failure to object to the prosecution's repeated references to a television (one of the alleged murder weapons) bearing the defendant's palm prints, where the television was not submitted into evidence. Again we are guided directly by *Jackson* and

indirectly by *Sumner*. Other implements revealing the defendant's prints were submitted as murder weapons used in this horrible crime. The record does not contain written findings that deal with this particular contention but does find the evidence to convict sufficient. Our consideration of the evidence and the totality of the circumstances regarding counsel's performance convince us that no error of constitutional proportions was caused by this omission.

Finally, Baldwin urges that counsel's failure to respond to the District Attorney's post-sentence memorandum to the Louisiana Supreme Court, which dealt with certain specific factual data, constitutes ineffective counsel. That court had before it the entire trial record. Counsel filed an extensive and voluminous brief. A post-conviction review of all the facts and proceedings was undertaken. We find this argument to be frivolous.

Baldwin next focuses his petition on the jury instructions, alleging that defects arose during the trial court's jury charges. He lodges a constitutional attack on the statutory scheme of Louisiana Code of Criminal Procedure art. 905 *et seq* as well. These claims will be addressed in turn.

The "reasonable doubt" charge at the guilt phase of petitioner's trial was properly given to the jury. *State v. Baldwin, supra*, Record, at Vol. 1, pp. 152 *et seq*. Operating under the dictates of § 2254(d) and *Sumner* we are not persuaded by the record that the Louisiana Supreme Court erred in determining that this charge was sufficient. Record at Vol. 1, p. 226. There is no merit, then, to the claim that the trial court violated Baldwin's Eighth and Fourteenth Amendment rights in its reasonable doubt instructions to the jury.

Petitioner asserts that the trial court failed to make clear in its sentencing phase instructions to the jury that a non-unanimous verdict (a hung jury) automatically bars the imposition of a death sentence. Louisiana Code of Criminal Procedure, art. 905.8. We disagree [4] and quote from those instructions:

> ". . . if you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, then life imprisonment without benefit of probation, parole or suspension of sentence is the only sentence that may be imposed."

Record at Vol. 8, p. 1698; *State v. Baldwin*, Trial Transcript (hereinafter referred to as "Transcript"), at 1151.

Baldwin argues that the jury was not adequately instructed as to the differences between murder one and two, the finding of at least one statutory aggravating circumstance. This is untrue. The trial court recited La. R.S. 14:30.1(B) which states the difference between the two offenses. Record at Vol. 1, p. 156. The jury's unanimous finding of two aggravating circumstances without requesting further instructions [5] also shows the lack of error at the guilt phase.

Baldwin cites various other alleged deficiencies in the sentencing phase jury instructions. The trial court followed the statutory procedures. See fn. 1. We must pass, then, upon the constitutionality of Louisiana Code of Criminal Procedure,

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[4] Compare the case at bar with *State v. Sonnier*, 379 So.2d 1336 (La. 1979) and *State v. Williams*, 392 So.2d 619 (La. 1980) where the juries exhibited confusion on this point and sought further instructions from the trial court. In both *Sonnier* and *Williams*, the death sentences were vacated.

[5] See footnote 4.

arts. 905 *et seq* itself, which is to be presumed valid. *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *rehearing denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158. The Georgia legislature revamped its capital sentencing statute in response to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Supreme Court struck down in *Furman* an earlier capital sentencing scheme that provided inadequate safeguards against "wanton and freakish" impositions of the death sentence.

In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), *rehearing denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158, a companion case to *Gregg*, the Supreme Court validated Florida's capital sentencing laws. The *Proffitt* court said ". . . while the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida, supra*, at 258. The Supreme Court noted approvingly that the Florida Supreme Court had interpreted and scrutinized the "especially heinous" aggravating circumstance sufficiently before validating it. *Proffitt v. Florida, supra*, at 255-256; *Gregg v. Georgia, supra*, at 201, n. 52.

Louisiana's former capital sentencing statute was struck down under the *Furman* standard in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), *rehearing denied* 429 U.S. 890, 97 S.Ct. 248, 50 L.Ed.2d 173. By way of response, the Louisiana legislature passed Louisiana Code of Criminal Procedure art. 905 *et seq*. The statute is modeled upon the one approved in *Gregg v. Georgia, supra*.

The Louisiana Supreme Court has interpreted and approved Louisiana's "especially heinous" aggravating circumstance. *State v. Sonnier*, 379 So.2d 1336 (La. 1979); *State v. Payton*, 361 So.2d 866 (La. 1978). Should a jury misunderstand this concept, the Louisiana Supreme Court, in its automatic review under art. 905.9.1, could discover such a misapplication of that aggravating circumstance.

Baldwin argues that the evidence was insufficient to find the "heinous" aggravating circumstance beyond a reasonable doubt. Without elaborating upon the victim's suffering we merely cite the Louisiana Supreme Court's findings that the evidence so supported this aggravating circumstance. The standards adumbrated in *Sumner* and § 2254(d) and the record evidence leads this court to support those findings.

Here, armed robbery was also found as an aggravating circumstance. Art. 905.4(a). This factor was specifically charged to the jury. Record at Vol. 8, 1700; Tr. at 1153. Standing alone, the finding by the jury of the armed robbery aggravating circumstance supplies the basis for the imposition of the death penalty. Art. 905.3. The capital sentencing statute overall has also been approved by the Louisiana Supreme Court. *State v. Martin*, 376 So.2d 300 (La. 1979); *State v. Williams*, 383 So.2d 369 (La. 1980). The United States Supreme Court denied certiorari and a rehearing of the constitutional questions posed by petitioner relative to art. 905 *et seq*. *Baldwin v. Louisiana, supra; see also Prejean v. Louisiana*, ____U.S.____, 66 L.Ed.2d 119, *rehearing denied* ____U.S. ____, 66 L.Ed.2d 489 (1980). Considering all of the foregoing factors it is eminently clear that Baldwin has not met his burden of proof of convincing this court that Louisiana Code of Criminal Procedure art. 905 *et seq* violates his Eighth and

Fourteenth Amendment rights. *See Gregg v. Georgia, supra,* at 175.

Baldwin contends that the trial court's rulings relative to the insanity defense violated his federally protected rights. We approved these rulings in the context of ineffectiveness of counsel, *supra,* and applied the *Sumner* formula. *Sumner* applies even more directly here as the state court's findings, cited above, squarely addressed these claims. We will not disturb those findings.

Petitioner argues that the Supreme Court affirmed the capital sentence based upon a non-statutory aggravating circumstance -the post-trial psychological evaluation. Although this information was discussed by the Supreme Court, their opinion reviews the two aggravating circumstances found by the jury. Its opinion affirming the sentence focuses upon those circumstance *See State v. Baldwin, supra,* at 677-678.

Under Louisiana law the Supreme Court is directed to automatically review capital sentences. Louisiana Code of Criminal Procedure, art. 905.9, 905.9.1; Louisiana Supreme Court Rule 28. The Florida and Georgia capital review procedures which vary slightly from Louisiana's in their proportionality review, [6/] have been declared constitutional by the United States Supreme Court, *Gregg v. Georgia, supra; Proffitt v. Florida, supra.* In Louisiana the review is district-wide and encompasses all murder one convictions. Louisiana Supreme Court Rule 28, §4(b). In Florida and Georgia it is a state-wide review procedure of murder one convictions resulting in the dea penalty, although in practice the Georgia Supreme Court does look at non-capital convictions as well. *Gregg v. Georgia,*

[6/] Proportionality review generally entails a survey of first degree murder convictions with the particular conviction being reviewed to determine whether the sentence is disproportionate considering both the other convictions and the circumstances o the case on review.

supra, at 204; *Proffitt v. Florida*, *supra*, at 258-259:

The United States Supreme Court, in approving the proportionality reviews presented in *Gregg* and *Proffitt*, was persuaded by the serious treatment that Georgia and Florida Supreme Courts gave to their duties under their respective state's statutes. *Gregg v. Georgia*, *supra*, at 204-205; *Proffitt v. Florida*, *supra*, at 259.[7/] The United States Supreme Court has denied certiorari on the question of whether Louisiana's proportionality review of capital sentences is constitutional. *Prejean v. Louisiana*, *supra*; *Baldwin v. Louisiana*, *supra*. We are satisfied that Louisiana's Code of Criminal Procedure affords defendants full protection under the Eighth and Fourteenth Amendments.

The Louisiana Supreme Court's capital sentencing review is also more than perfunctory. Over half of the capital sentences imposed in Louisiana have been set aside. *State v. Williams*, 392 So.2d 619 (La. 1980); *State v. Sonnier*, 380 So.2d 1 (La. 1979); *State v. Sonnier*, 379 So.2d 1336 (La. 1979); *State v. Collins*, 370 So.2d 533 (La. 1979); *State v. English*, 367 So.2d 815 (La. 1979).

The Louisiana Supreme Court has applied the capital sentencing review procedures rationally and consistently. Baldwin cannot assert "that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience . . .". *Spinkellink v. Wainwright*, *supra*, at 506, n. 28.

7/ Louisiana's district-wide survey may even be seen as more reasonable than a state-wide survey as all venires are pulled from the same district. Further, Louisiana's proportionality review encompasses capital and life sentences, whereas Florida's comparisons involve capital sentences only. *Profitt v. Florida*, *supra*, at 258-259.

Baldwin cites the state's successful challenges for cause of "approximately 20" veniremen at his trial who were opposed to the death penalty as violative of his federally protected right to a fair and impartial jury. Petitioner does not name these prospective jurors nor does he refer this court to particular passages of the voir dire testimony in support of his position. Although we will not evaluate this issue for lack of specificity, *see Sumner v. Mata, supra,* at 732, our independent review of the voir dire transcript of the jurors selected satisfies us that an impartial jury was chosen. *See Spinkellink v. Wainwright, supra,* at 594.

Petitioner alleges a violation of his Sixth and Fourteenth Amendment rights occurred when the trial court failed to properly instruct the jury on sequestration rules or to insure their compliance therewith. See Louisiana Code of Criminal Procedure, art. 791. Although only five jurors were selected when the trial court gave instructions on sequestration, the entire venire panel was addressed. Record at Vol. IV, pp. 737-740; Tr. at 190-193. On the second day of trial, Baldwin's counsel brought to the attention of the court a prejudicial newspaper article that possibly biased the remaining venire panel. The court did not find any such bias. Petitioner admits that he cannot point to specific instances of juror misconduct "but asserts that an evidentiary hearing is required." In essence, no assertion of actual prejudice is made. A hearing would be nothing more than a fishing expedition. That is not the purpose of federal habeas review. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Our reading of the voir dire testimony, as stated above, assures us that the trial court correctly ruled on the matter.[8/]

8/ The one alternate juror is singled out for the court's failing to question him on the newspaper article. His testimony on voir dire reveals a bias against the death penalty. This directly undercuts Baldwin's claim above that all such opinionated jurors were successfully challenged for cause by the state as well as his argument that this juror may have been prosecution-prone. We see no reason to assume he was biased by the newspaper article. After all, as an alternate, he did not deliberate on the case.

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Baldwin points out at least one short break when the jury was alleged to have been unattended as well as the dirth of admonishments by the trial judge. We find that these procedural lapses did not render the trial fundamentally unfair.[9/]

Concerning an alleged error arising from juror Puckett's "concealment" of a friendship with the District Attorney, both the trial and reviewing courts found this claim to lack merit. *State v. Baldwin, supra,* at 672. We are not persuaded to hold otherwise.

The argument that the trial court erred in denying the defendant's motion for a change of venue is unfounded. We refer to our discussion of counsel's performance relative to this motion, *supra,* rather than reiterate it here in support of our view.

Petitioner alleges that he was subjected to an unreasonable search and seizure, in violation of his Fourth and Fourteenth Amendment rights. The trial court held a hearing on defendant's motion to suppress the evidence seized from his van and motel room. Record at Vol. III, pp. 438-515. The motion was denied. The Louisiana Supreme Court affirmed this ruling. *State v. Baldwin, supra,* at 670. Both courts found that Baldwin freely and voluntarily consented to the search. The warrant which precipitated that search was clearly supported by probable cause. Baldwin presents nothing here that convinces us to view the admission of the fruits of that search as constitutional error.

Finally, and without supportive evidence or authorities Baldwin claims that Louisiana's death penalty statute as applied

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9/ The Louisiana Supreme Court has set aside convictions for flagrant violations of the sequestration rules in capital cases. *State v. Parker,* 372 So.2d 1037 (La. 1979); *State v. Martin,* 32 So.2d 688 (La. 1976); *State v. Hunter,* 306 So.2d 710 (La. 1975) *State v. Laquette,* 275 So.2d 396 (La. 1973). Compare *State v. Sheppard,* 350 So.2d 615 (La. 1977).

constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments and disproportionately affects blacks and economically depressed persons in violation of the equal protection clause. Without discussing the threshold issue of standing to raise the equal protection claim, we dismiss both contentions for lack of any serious attempt by petitioner to substantiate them.

Baldwin does not present any issues in this habeas corpus petition that warrant intervention by the federal judiciary. *See Spinkellink v. Wainwright, supra,* at 606, n. 28. Accepting as we must, the premise that a democratic society may create a rational system for the putting to death of one of its members for the murder of another,[10/] we find that Timothy George Baldwin has been afforded protection of his rights under the constitution.

For all of the above reasons, it is ordered that petitioner's application for stay of execution be and it is hereby denied. It is further ordered that petitioner's application for writ of habeas corpus be and it is hereby denied. It is further ordered that the temporary stay of execution, rendered by this court on March 27, 1981, expire on May 4, 1981, at 12:00 o'clock noon.

DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this the 28th day of April, 1981.

UNITED STATES DISTRICT JUDGE

10/ *Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), *rehearing denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158; *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. La., supra.*

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED IN EVIDENCE
FILED
APR 28 1981
ROBERT H. SHEMWELL, CLERK
BY [signature] Deputy

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

TIMOTHY GEORGE BALDWIN	:	
-vs-	:	CIVIL ACTION NO. 81-0554
FRANK C. BLACKBURN, Warden, Louisiana State Penitentiary, and WILLIAM J. GUSTE, JR., Attorney General, State of Louisiana	:	

JUDGMENT

For written reasons assigned this date, it is

ORDERED, ADJUDGED AND DECREED that petitioner's Application for Stay of Execution be and it is hereby DENIED. It is further ORDERED that petitioner's Application for Writ of Habeas Corpus be and it is hereby DENIED. It is further ORDERED that the Temporary Stay of Execution, rendered by this Court on March 27, 1981, expire on May 4, 1981, at 12:00 o'clock noon.

Alexandria, Louisiana, this the 28th day of April, 1981.

[signature]
UNITED STATES DISTRICT JUDGE

APPENDIX E

SUPREME COURT OF THE UNITED STATES

TIMOTHY GEORGE BALDWIN **81 6301**

versus

FRANK BLACKBURN, et al.

RECEIVED
MAR 3 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

Motion to Proceed in Forma Pauperis

Now into Court comes the petitioner, Timothy George Baldwin, through his undersigned counsel, and moves the Court to allow him to proceed in forma pauperis in this matter. Petitioner has had appointed or volunteer counsel since his arrest, as he has been unable to pay for representation. By the attached affidavit, petitioner attests to his poverty making him unable to pay for the costs of these proceedings.

Respectfully submitted,

Dwight Doskey

Dwight Doskey
Counsel for Petitioner
2700 Tulane Avenue, Room 112
New Orleans, La. 70119
Tel.: (504) 821-8101

ORDER

In view of the above motion and the supporting affidavit, it is hereby ordered that petitioner Timothy George Baldwin be allowed to proceed in forma pauperis in this matter.

Washington, D.C., this _____ day of _____, 1982.

JUSTICE

81 6301

SUPREME COURT OF THE UNITED STATES

TIMOTHY GEORGE BALDWIN

versus

FRANK BLACKBURN, et al.

RECEIVED
MAR 3 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

Affidavit in Support of Motion to Proceed on Certiorari in Forma Pauperis

I, Timothy George Baldwin, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress, and that the issue which Idesire to present on certiorari include tose in the accompanying brief.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for certiorari are true.

1. I am not presently employed, but my last employment terminated on 1978, when I was working for Myself and receiving _____ as salary.

2. I have not received any income in theform of rent payments, interests, or dividends within the past twelve months.

3. I own no checking or savings account, and have only 0 dollars in cash.

4. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Timothy G. Baldwin
Timothy George Baldwin

Subscribed and sworn to before me on this 26 day of Feb. 1982.

Kendall Cooley
NOTARY PUBLIC

Opposition

APR 3 1982
CLERK
SUPREME COURT U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 81-6301

TIMOTHY GEORGE BALDWIN
Petitioner

VERSUS

FRANK C. BLACKBURN
Warden, Louisiana State Penitentiary

and

WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA B. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

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OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI

* *

Petitioner, Timothy George Baldwin, has applied to this Honorable Court for a Writ of Certiorari setting forth three issues for review. It is respectfully submitted that this application should be denied for the reasons set forth as follows.

SUMMARY OF ARGUMENT

Petitioner alleges the lower courts erred in failing to find his counsel to have been ineffective or alternatively to have held an evidentiary hearing on the question. The basis for this claim is the lack of presentation by counsel of certain affirmative defenses; that of intoxication, alibi and insanity.

The State submits trial counsel for the petitioner were effective and hindsight or mere speculation as to possible alternative defenses is frivolous. As the court held in Haggard v. State of Alabama, infra, errorless counsel is not required but rather only reasonably effective assistance. As the record indicates, error is not present in constitutional proportions. The State further submits the alleged error by trial counsel in its determination to not pursue these defenses was due to a lack of a factual existence of such (as again indicated by the record) and not a lack of competence or ability. Moreover, the State asserts defense counsel presented a coherent and logical defense, contrary to petitioner's after the fact allegations, one of denying his connection to or commission of the crime.

Petitioner in his second allegation states that the lower courts erred in denying his relief as the Louisiana System for review of proportionality of sentence is unconstitutional, particularly in that it is only 'district wide'.

The State submits the Louisiana system of capital review is rational, consistent and in compliance with the guidelines set forth in Gregg, Proffitt and Jurek. Moreover the system of review, although initially focusing upon a judicial district and its verdicts in capital cases, also examines all first degree murder cases regardless of verdict within the district. Furthermore, as the Louisiana State Supreme Court is a court of statewide review, it necessarily and legislatively is required to review for disportionality in penalty considering both the crime and the defendant. Louisiana Supreme Court Rule 28. Thus the imposition and review of sentence were constitutional.

Petitioner claims in his final issue that the court erred in denying his application on the basis of improper charges to the jury in both the guilt and sentencing phases of his bifurcated trial.

The State asserts the jury charges were adequate in both instances, and prejudice is not shown.

On the basis of the facts and argument presented, the State of Louisiana submits petitioner Timothy George Baldwin is not entitled to relief by writ and an affirmation of the decisions of the United States District Court and of United States Court of Appeal Fifth Circuit is dictated.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Mrs. Mary James Peters, age 84, lived for a number of years at 110 Ludwig Street, West Monroe, Louisiana. In the early 1970's, Mrs. Peters met Mrs. Rita Baldwin and her husband, Timothy George Baldwin. For a period of time the Baldwins lived in the neighborhood and Mrs. Peters and Mrs. Baldwin became friends. Mrs. Baldwin and her children frequently visited Mrs. Peters and Timothy George Baldwin did miscellaneous repair jobs at her house on several occasions. In November of 1977, Timothy George Baldwin moved his family from Louisiana to Cleveland, Ohio. He separated from his wife and began a relationship with Marilyn L. Hampton. In January of 1978, Timothy George Baldwin and Marilyn Hampton left Ohio and travelled to Florida. Also travelling with them, were Marilyn Hampton's children and an individual named William Odell Jones. In early April, 1978 the group left Florida and travelled to Jackson, Mississippi, arriving on the night of Sunday, April 2. The next day, they went to the Holmes County State Park and rented a cabin. On the morning of Tuesday, April 4, 1978, Timothy George Baldwin and Marilyn Hampton left the park and drove to West Monroe, Louisiana. They intended at this time to rob Mrs. Mary James Peters and to kill her if it was necessary to accomplish their purpose. They arrived in West Monroe and visited the Baldwin children until approximately 8:00 p.m. They then left and went to the residence of Mrs. Peters. After a period of time, Timothy George Baldwin attacked Mrs. Peters and struck her with a skillet, telephone, and other objects which he found in her kitchen. Two young men were passing the house and saw a portion of the beating but did not realize at the time the gravity of the offense which they viewed. Timothy George Baldwin and Marilyn Hampton took a small safe containing U.S. bonds and other valuables and left the residence. They drove to El Dorado, Arkansas, where they opened the safe. They drove to the Holmes County State Park in Mississippi the next day. Mrs. Peters was discovered at about 11:30 a.m. on Wednesday, April 5, 1978 in a semi-conscious condition. She was taken to the hospital but died on April 6, 1978. They were accompanied by the children of Marilyn Hampton and William Odell Jones. Before reaching the Monroe-West Monroe area they threw the safe taken from Mrs. Peters' residence into a canal. The group returned

to Mississippi and left William Odell Jones in Greenville. Timothy George Baldwin and Marilyn Hampton were arrested in El Dorado, Arkansas on the night of Saturday, April 8, 1978. Their vehicle was later searched and the bonds and some of the other stolen property was recovered. The safe was later removed by officers from the canal where it had been dumped. On May 23, 1978, the Ouachita Parish Grand Jury returned a true bill of indictment charging Timothy George Baldwin with first degree murder. He plead not guilty. Trial was held in Fourth Judicial District Court, Ouachita Parish, on July 24-28, 1978 and the jury returned a verdict of guilty. Following the verdict a sentence hearing was held. The jury found the existence of two aggravating circumstances, to-wit: 1. The offender was engaged in the perpetration or attempted perpetration of armed robbery, and 2. The offense was committed in an especially heinous, atrocious or cruel manner. It was the unanimous recommendation of the jury that Timothy George Baldwin be sentenced to death. Timothy George Baldwin was remanded and sentenced on September 5, 1978 to death. The conviction and sentence were affirmed by the Louisiana Supreme Court and a rehearing was denied. See State v. Baldwin, 388 So.2d 644 (La. 1980). The United States Supreme Court denied the petition for writ of certiorari on January 12, 1981. Baldwin v. Louisiana, _____ U.S. _____, 101 S.Ct. 901, 66 L.Ed. 2d 830 (1981). A death warrant was signed and the execution date set for March 31, 1981. Habeas corpus relief was denied by the state district court and Louisiana Supreme Court. The United States District Court for the Western District of Louisiana stayed the execution pending review of petitioner's application for writ of habeas corpus. On April 28, 1981, the court denied the writ by written opinion and ordered the stay dissolved at noon on May 4, 1981. A new execution date of March 31, 1981 was set but this was stayed until further order of the Court of Appeal, Fifth Circuit. Petitioner's sought for relief was denied in the Fifth Circuit by written opinion on August 14, 1981. An execution date was again set and subsequently stayed pending petitioner's application for Relief to this Court.

ARGUMENT

QUESTION NO. 1 - EFFECTIVENESS OF COUNSEL

Petitioner argues the courts below erred in failing to find ineffective assistance of counsel and failing to hold a hearing on this issue.

In United States v. Gray, 565 F.2d 881 (5th Cir. 1978) the Court said:

> "The appropriate test to be applied is whether counsel was reasonably likely to render and did render reasonably effective counsel.
>
> A review of Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record."
> 565 F.2d 887

See also United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978), United States v. Carter, 566 F.2d 1265 (5th Cir. 1978) and Carlo v. United States, 581 F.2d 91 (5th Cir. 1978).

In Haggard v. State of Alaba_, 550 F.2d 1019 (5th Cir. 1977), the Court stated:

> "This Court has interpreted the Sixth Amendment to require 'not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'
> Mac Kenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L. Ed. 2d 78 (1961) (emphasis in original)."

Petitioner testified at his trial that he and Marilyn Hampton went to the house of Mrs. Mary James Peters on the night of April 4, 1978; that he stayed for 1 1/2 to 2 hours; that Mrs. Peters was still alive and had not been harmed when he left; that he was drinking alcoholic beverages but was conscious of his activities; and that he and Marilyn Hampton went to El Dorado, Arkansas after they left West Monroe. Tr. Vol. 4, p. 1974-1117.

Petitioner now argues that his counsel abandoned the intoxication defense and asserted no defense at all. The theory of petitioner's defense was that he had been present at victim's house but that he had left before the offense was committed. His attorneys laboriously cross-examined all state witnesses and developed several factual inconsistences. Petitioner

now contends that this was an inadequate theory of defense and that intoxication or alibi would have been more likely to have been accepted by the jury. These "hindsight" contentions ignore the work and time which his attorneys devoted to this case during the three months which preceded trial, and during the five day trial.

It is further argued by petitioner that his attorneys failed to prove that he and Marilyn Hampton lodged in El Dorado, Arkansas following their visit to West Monroe on the afternoon and night of April 4, 1978. It was acknowledged at trial that the two went to this location after their offense. See testimony of petitioner, Tr. Vol. 4, p. 1098 and testimony of William Odell Jones, Tr. Vol. 3, p. 768. The defense attorneys obtained no evidence beyond that which had been acknowledged.

It is submitted that the allegations are insufficient in the totality of the circumstances to conclude that petitioner was deprived of reasonably effective assistance of counsel. Even assuming petitioner's allegation of counsel choosing the wrong course for his defense are true, the Federal courts have consistently held such tactical decisions are not tantamount to ineffective assistance. See Beckham v. Wainwright, 639 F.2d 262, 265 (5th Cir. 1981).

Petitioner further asserts error occured when the courts below failed to grant and order an evidentiary hearing on his allegations of ineffective assistance. The Federal judiciary has never hesitated to grant such hearings upon a showing by a defendant of issues unable to be resolved from the record presented for review.

The existence of this element, an inadequate record, is the pertinent standard not the speculative and assumptive retrospective allegations of a defendant. See Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed. 2d 136 (1977); Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981); Harris v. Oliver, 645 F.2d 327 (5th Cir. 1981); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980).

As the reviewing courts below have stated, the record is sufficient to determine conclusively the merit or lack thereof of petitioner's allegations and thus an evidentiary hearing is not required or necessary.

QUESTION NO. II - CONSTITUTIONALITY OF REVIEW

Petitioner contends that the Louisiana provision for review of capital sentences is unconstitutional in that meaningful appellate review is not available. Particularly, petitioner asserts that statewide comparative review of death sentences is mandated and thus review of judicial district capital cases among themselves is a denial of equal protection.

Respondent submits that this contention is without merit.

The United States Supreme Court has upheld the death penalty in those situations where a state's capital punishment statute is found to be neither arbitrary nor capricious. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L. Ed. 2d 926 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L. Ed. 2d 913 (1976). The Court in Gregg, supra, held the statute to be acceptable as it focused the jury's attention to the nature of the crime and the individual, while channeling the jury's discretion and thus the likelihood of capricious or freakish imposition of the penalty. The high court further observed that the legislated review function of the State's Supreme Court "... affords additional assurance..."

The court in Jurek, supra, also approvingly noted that State's high court review function stating "... by providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote evenhanded, rational and consistent imposition of death sentences under law." Jurek, supra at 276.

The Court thus requires a system of appellate review to ensure evenhanded disposition of capital cases, but has never put forth any one system to be sacrosanct. The goal sought is an elimination of caprice; and to place in its stead rationality and consistency.

The system of review in Louisiana which seeks this end to ensure consistent with those approved in Texas, Georgia, and Florida. A court with statewide jurisdiction is legislatively required to review each case where the sentence of death has been imposed and, in turn satisfy itself that the sentence was not "...imposed under the influence of passion, prejudice or any

other arbitrary factors, whether the evidence supports the jury's finding of a statutory circumstance, and whether the sentence is disportionate to the penalty imposed in similar cases, considering both the crime and the defendant. La. Code of Crim. Proc. 905.9.1, Supreme Court Rule 28. The court further requires the district attorney to file a list of all first degree murder cases occurring within his district having occurred since January 1, 1976 with a synopsis of its facts, the crime convicted of and sentence imposed. Sup. Ct. Rule 28 § 3. This is in addition to the court's knowledge, jurisdiction and review of all other murder cases throughout the State. Thus, though the court's scrutiny is directed initially toward those murder cases within a given judicial district the review is not limited to such. This mode of review, it must be noted, has been attacked on direct review to the U.S. Supreme Court in a number of cases including petitioner's application for writ of certiorari. Petitioner in his "Questions presented for Review" specifically alleged this procedure as a violation of equal protection and due process. The court denied certiorari on January 12, 1981 and thus effectively found no merit to this contention. The Louisiana Supreme Court here as in Gregg, Jurek and Proffitt, has enunciated a system of review whereby a court of statewide jurisdiction can assure consistence, fairness, evenhandedness and rationality. The system assures capital punishment will not be arbitrarily and capriciously imposed. In support of this contention the State submits of the capital sentences impose in Louisiana, well over half have had the death sentence set aside. See State v. Sonnier, 380 So.2d 1 (La. 1979); State v. Sonnier, 379 So.2d 1336 (La. 1980); State v. Williams, 392 So.2d 619 (La. 1980); State v. Collins, 370 So.2d 533 (La. 1979); State v. English, 367 So.2d 815 (La. 1979).

Clearly the method of imposition and review of the death sentence by the State of Louisiana is constitutional and this issue is without merit.

QUESTION NO. III - COURT'S CHARGE TO JURY

Errors by the district court are alleged on the basis of what petitioner terms as incomplete and misleading instructions to the jury on first and second degree murder during the guilt-innocence phase of trial.

Respondent submits the unobjected to, alleged error is not subject to federal habeas review absent a clear showing of prejudice.

The United States Supreme Court held in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 53 L.Ed. 2d 594 (1977), that a defendant who did not con-

temporaneously object during a state trial, and was thus barred state review on state procedural grounds, could not thereafter raise the issue on federal habeas review absent a clear showing of prejudice.

As the record indicates no contemporaneous objection to the judge's charge, Louisiana State courts would normally not review the alleged error. See La. Code of Crim. Proc. Art. 841, State v. Kelly, 375 So.2d 1344 (La. 1979) and State v. Valentine, 364 So.2d 595 (La. 1978). Therefore, Wainwright v. Sykes, supra, should prevent collateral federal review.

Such review (in the absence of a contemporaneous objection) though has been allowed in a limited number of instances on both the federal and state level. The federal test as enunciated in Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed. 149 (1976), and re-affirmed in Sykes, supra, made clear review was barred unless a defendant could show actual prejudice. Sykes, supra at 2506.

Similarly the Louisiana State Courts have conducted, in cases recommending the death penalty, an independent review for possible error regardless of the failure by defendant to contemporaneously object. The Louisiana Courts have predicated this review upon Section 1 of Supreme Court Rule 28; charging the Court with the responsibility to review the jury's recommendation to determine if the sentence was influenced by passion, prejudice or any arbitrary factor. State v. Sonnier, 379 So.2d 1336 (La. 1979); State v. Williams, 392 So.2d 619 (La. 1980). Respondent submits that the prejudice required by each of these modes of review is not exhibited in the case of petitioner. No actual prejudice is shown. Rather it seems to be requested that the courts presume prejudice without any factual showing.

At the time defendant committed the charged offense, the Statutes of first degree murder (La. R.S. 14:30) and second degree murder (La. R.S. 14:30.) provided as follows:

> La. R.S. 14:30 First Degree Murder
> First degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm.
> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury.

La. R.S. 14:30.1 Second Degree Murder
A. The killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill; or
B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.
Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of forty years.

Louisiana Code of Criminal Procedure Article 905.4, referred to in R.S. 14:30.1 (B), provides:

The following shall be considered aggravating circumstances:
(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary or armed robbery;
(b) The victim was a fireman or a peace officer engaged in his lawful duties;
(c) The offender was previously convicted of an unrelated murder, aggravated rape or aggravated kidnapping;
(d) The offender knowingly created risk of death or great bodily harm to more than one person;
(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;
(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;
(g) The offense was committed in an especially heinous, atrocious or cruel manner.

State v. Payton, 361 So.2d 866 (La. 1978), held that R.S. 14:30.1 had the effect of redefining first degree murder as a specific intent homicide accomplished with a statutorily prescribed aggravating circumstance. Sections (c), (f) and (g) of Article 905.4 were to be excluded for the murder definition so as to prevent improper considerations by the jury during the guilt-innocence phase of the trial, however all seven (a through g) were to be considered during the sentencing hearing.

The State acknowledges Payton, supra, was not finalized until some three weeks after defendant's trial (and in fact not published and reported until some months after trial). Therefore the State, defendant and trial Court proceeded unaware of Payton's requirements.

Petitioner asserts based on the above facts that Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980) would mandate the granting of relief.

The State submits Beck and petitioner's factual circumstances are distinguishable. In Beck the Alabama scheme eliminated all responsive verdicts, and thus this court believed an intolerable element of uncertainty and unreliability was injected into the factfinding process. In petitioner's case responsive verdicts were allowed and considered, both second degree murder and manslaughter (See transcript). The question thus becomes not one of a total lack (as in Beck) but rather adequacy and prejudice. If the instruction given to the jury was so imprecise as to render arbitrary or insupportable the finding of guilt, then petitioner could be entitled to relif. The state submits such harm is not shown.

Wainwright v. Sykes sets forth a two prong test for habeas relief, cause and prejudice. Petitioner, the State believes, may have established cause: the Payton error in instructing the jury. However, prejudice or harm is not. Habeas relief does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial as a whole fundamentally unfair. Sykes, supra; McDonald v. Sheriff of Palm Beach, Florida, 422 F.2d 839 (5th Cir. 1970); Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969); Gomez v. Beto, 420 F.2d 766 (5th Cir. 1968). As the trial transcript indicates, although the jury was not instructed to find a specific aggravating circumstance in the guilt phase, two were found unanimously in the penalty (the heinous nature of the crime [g] and commission during the perpetration of an armed robbery [a]). The second of these would have been sufficient to support a conviction of first degree murder under Payton. Of crucial significance are the circumstances surrounding the jury's finding of the aggravating factors: the State did not present any evidence of aggravating factors in the sentencing portion, but relied on the armed robbery evidence introduced in the guilt portion of the trial. The only evidence in fact adduced during the penalty portion were mitigating factors put forth by the defense. Logically and factually petitioner therefore suffered no prejudice as all elements of the offense were unanimously found and agreed upon by the jury. Consequently petitioner is not entitled to relief.

CONCLUSION

The State of Louisiana prays that after consideration and review of the record petitioner's application for certiorari be denied and all stays vacated.

Respectfully submitted,

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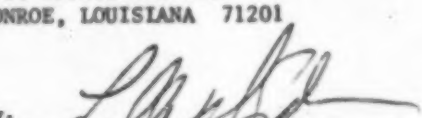
BY: 
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Amicus Brief

Supreme Court, U.S.
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APR 1 1982
ALEXANDER L. STEVAS

No. 81-6301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TIMOTHY GEORGE BALDWIN,

Petitioner,

v.

FRANK C. BLACKBURN, Warden, Louisiana State Penitentiary,

and

WILLIAM J. GUSTE, JR., Attorney General, State of Louisiana,

Respondents.

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 81-6301

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

==========

TIMOTHY GEORGE BALDWIN,

Petitioner,

v.

FRANK C. BLACKBURN, Warden, Louisiana State Penitentiary, and WILLIAM J. GUSTE, JR., Attorney General, State of Louisiana,

Respondents.

==========

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

==========

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established to assist black citizens

in securing their constitutional rights. In 1967, it undertook to represent all condemned prisoners for whom adequate representation could not otherwise be found. It has frequently represented condemned prisoners before this Court. E.g., Maxwell v. Bishop, 398 U.S. 262 (1970); Furman v. Georgia, 408 U.S. 238 (1972); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Davis v. Georgia, 429 U.S. 122 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Coker v. Georgia, 433 U.S. 584 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Estelle v. Smith, 451 U.S. 454 (1981); Zant v. Stephens, No. 81-89 (argued Feb. 24, 1982); Enmund v. Florida, No. 81-5321 (argued March 23, 1982). The Fund has also appeared before this Court as amicus curiae

in other capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Adams v. Texas, 448 U.S. 38 (1980).

The Legal Defense Fund continues to provide legal assistance to indigent condemned prisoners, and is now involved in over one hundred death cases. It represents a substantial number of death-sentenced inmates within the states of the Fifth Circuit, who are at various stages of state and federal postconviction proceedings. Additionally, the Fund provides consultative assistance to attorneys representing a large number of other capital defendants both in the Fifth Circuit and elsewhere.

The issues presented by this case are of general applicability to a number of death-sentenced prisoners within the Fifth

Circuit, including several represented by the Fund. In view of the Fund's experience with these constitutional questions, the adverse impact upon our clients of the court of appeals' inadequate treatment of those questions below, and the lateness of the hour for Mr. Baldwin himself, we respectfully request the opportunity to present our views in the hope that they may be of assistance to the Court.

Consent has been granted by both petitioner and respondent for the filing of this amicus curiae brief.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc., believes that the certiorari petition filed in this case does not do justice to Mr. Baldwin and the

substantial constitutional claims under which he is entitled to relief. In particular, our scrutiny of the Louisiana trial record reveals several critical facts, not called to the attention of this Court or the federal courts below, that are extremely significant to Mr. Baldwin's claims. Since petitioner will in all likelihood be put to death if review is denied by this Court,[1/] he is at the very

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1/ Mr. Baldwin is the first death-sentenced federal habeas corpus petitioner to be denied relief by a court of appeals since John Spenkelink, who was executed in Florida on May 25, 1979. However, according to our records, 42 other death cases are presently pending on federal habeas corpus appeals in the Fifth, Eighth and Eleventh Circuits. Thus, the argument advanced in some quarters that this Court should rule against death-sentenced individuals merely to combat public frustration over the small number of executions (see, e.g., Brief of Amicus Curiae Washington Legal Foundation in Zant v. Stephens, No. 81-89) will in the near future lose its underlying factual premise. Surely, under

[Footnote 1/ continues on next page]

least entitled to a full airing of the facts of record which support the issues he has advanced.

I

IN VIEW OF THE GROSSLY INEFFECTIVE ASSISTANCE OF COUNSEL ACCORDED THIS PETITIONER, THE DISTRICT COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING ON HIS CLAIM OF INADEQUATE REPRESENTATION RATHER THAN SUMMARILY DISMISSING HIS HABEAS CORPUS PETITION

Petitioner Timothy Baldwin stands condemned to die as a result of grossly inadequate representation by his attorneys. Despite Mr. Baldwin's claim that he is innocent and was in Arkansas at least 70 miles away when the crime took place, trial counsel failed adequately to consult with him before trial and to engage in the

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1/ Continued

any civilized system of justice, Mr. Baldwin's claims should not receive any less consideration because he is the first individual since John Spenkelink to reach the eleventh hour.

pretrial investigation and preparation necessary to present this defense. As a result, no evidence other than petitioner's own testimony was introduced at trial to support his version of the facts. Even upon discovering new evidence after trial which conclusively establishes the viability of petitioner's alibi defense,[2/] his lawyers failed to move for a new trial. Their inattentiveness was so great that they did not even notice the trial court's failure to instruct the jury on the elements of the crime for which petitioner was convicted; and, following his conviction, they put on virtually no case at all at the penalty phase.

2/ The portions of the trial record which rendered this new evidence so crucial to petitioner's claim of innocence are not only absent from the certiorari petition, but also were not called to the attention of either the court of appeals or the district court below. See pp. 13-17, infra.

A.

Defense counsel's failure to consult with Mr. Baldwin adequately in advance of the trial is best illustrated by a concession counsel made during a pretrial hearing on an unsuccessful motion for appointment of a psychiatrist at the State's expense. Counsel took the stand and stated that "it is my feeling that a psychiatrist is indicated in this case," R. 526,[3/] but upon cross-examination admitted that he had not even asked Mr. Baldwin about any history of mental disorder. Counsel had filed the motion and come to the hearing without so much as questioning petitioner as to whether he had ever been treated by a psychiatrist or psychologist, or whether he had ever been

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3/ Numbers preceded by "R." refer to pages of the record of petitioner's appeal to the Louisiana Supreme Court.

to a mental health center or a mental hospital.[4/]

Earlier on the day of this hearing, conducted 12 days before trial, defense counsel conceded that he had not explored a possible insanity defense sooner because "I've been somewhat busy the last month." R. 411. And in his motion for a new trial, counsel expanded upon this excuse: at the time of the pretrial hearing, he and his co-counsel "had only recently finished a six day long murder trial" in another case. R. 171.

4/ Q. [By the Prosecutor] ... do you know of any history of mental problems, diseases, illness, or any treatment in the past that your client has undergone?

A. [By Defense Counsel] To my personal knowledge I know of no mental illness per se. I don't know exactly what you mean by mental illness?

[Footnote 4/ continues on next page]

Having failed to explore a defense of insanity until less than two weeks before trial, defense counsel did not engage in

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4/ Continued

Q. Well, has he ever been to a mental health center to seek any kind of help or treatment?

A. I don't know that of my own personal knowledge.

Q. Do you have any information that he has?

A. No. I do not.

Q. Has he ever been to a psychiatrist or a psychologist, to your knowledge, to seek any treatment?

A. To be honest, I do not know. I have not gone into that.

Q. To your knowledge has he ever been evaluated mentally by a psychiatrist, psychologist, or any mental health center?

A. Again, I do not know the answer to that.

[Footnote 4/ continues on next page]

any serious pretrial investigation or preparation to support petitioner's claim of innocence. At trial, only two defense witnesses were called. The first, petitioner's wife, was not with him during the relevant time period and had no testimony to offer concerning his alibi. R. 1587-1620. The second, Mr. Baldwin himself, testified that he had visited the deceased earlier on the evening of the crime,

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4/ Continued

> Q. In other words you haven't questioned your client about those subjects?
>
> A. I have not questioned him about his history or possible history with psychiatrist and psychologist. No, I haven't, and I do not know whether or not he has ever been to a mental health center or a mental hospital.

R. 526

socialized with her as he had many times in the past, and left. R. 1639-45. He maintained that he had not returned to her house later that night, but rather had proceeded to El Dorado, Arkansas. R. 1644-46. He denied striking or hurting the deceased in any way. R. 1658.

Defense counsel did not present a shred of independent evidence in support of petitioner's version of the facts, but rather rested after the conclusion of petitioner's testimony. R. 1664.

As the opinion of the court of appeals reflects, "[f]ive months after trial, [defense] counsel acquired a motel receipt indicating that appellant was in El Dorado, Arkansas, some 70 miles away, on the night of the murder." Certiorari petition Appendix C, p. 24; 653 F.2d at 947. The court of appeals excused counsel's failure

to move for a new trial on the basis of this evidence, reasoning that it "probably" did not provide an adequate alibi because it did not reflect "a check-in time inconsistent with appellant's presence in the victim's house [in West Monroe, Louisiana] between 10:00 and 11:00 p.m., the time of the murder. State v. Baldwin, 388 So. 2d at 669." Ibid. The court of appeals further assumed on this basis that the alibi defense was "without merit," id. at 23, 653 F.2d at 947, and that counsel should not be faulted for failing to pursue it at trial.

The court of appeals did not understand the significance of the motel check-in receipt, because petitioner's present counsel did not call to the attention of that court or the district court the portion of the record that proves its

importance. The receipt does not reflect any check-in time, but it is dated the day of the murder -- April 4, 1978.[5] And according to one of the State's witnesses, a neighbor of the deceased named J.C. Hawkins, the van driven by the killer or killers was still present outside the deceased's house in West Monroe at 11:10 P.M. on the night of the murder. When asked whether she was "really positive about the time," Mrs. Hawkins responded:

> Yes sir ... because I went into my kitchen to turn my kitchen lights out at ten minutes after eleven and it [the van] was still sitting over there with the lights on.

R. 1102.[6] Since El Dorado, Arkansas is at

5/ District court record at 91.

6/ Two other State's witnesses saw a van outside the house as late as a little after 10 P.M. (R. 1118, 1130), but did not know how much longer it had stayed. Still two

[Footnote 6/ continues on next page]

least 70 miles from West Monroe, it is utterly implausible that petitioner could have reached El Dorado by midnight in time to have checked in on April 4, 1978. The alibi defense was by no means frivolous or insubstantial.7/

6/ Continued

more State's witnesses saw a van outside the house at about 10:15 P.M. (R. 1143, 1147, 1196, 1198), and observed what appeared to be a beating inside the house at that time (R. 1145-46, 1197); these witnesses proceeded to a store less than a block away (R. 1144), where they stayed a brief while -- 8 minutes according to one (R. 1149, 1162), 15 minutes according to the other (R. 1198, 1199). Walking back from the store together, they saw a man and a woman leave the house and enter the van (R. 1149-51, 1199-1200). One of these witnesses said that the van "slowly drove off" at this time (R. 1151); the other, when asked "and they just drove off?", replied: "No we went on to the [witnesses'] house, I didn't stick around" (R. 1212).

7/ According to the State's witnesses, petitioner was at a state park in Mississippi on April 3rd and did not leave there until about 10 A.M. on the morning of

[Footnote 7/ continues on next page]

The courts below similarly were not directed to the facts that (i) one of the witnesses who had observed a male and female visitor to the deceased's home and had seen what appeared to be a beating in her home on the night of the murder (see n.6, supra) viewed petitioner in a line-up and identified another person in the line-up as the male visitor he had seen (R. 1176); (ii) the initial police bulletins had described the killer as being in his twenties, whereas petitioner is in his forties (R. 1465-66); and (iii) the initial police bulletins had described the killer's

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7/ Continued

April 4th; he arrived in West Monroe at about noon on the 4th, and stayed there the entire day visiting with his children and stepchildren (R. 1224-25, 1259-61, 1353). Any suggestion that he went to El Dorado, Arkansas on the morning or afternoon of April 4th would be directly contradictory to the State's evidence.

vehicle as a brown Dodge van and one neighbor had described its color as "goldish" (R. 1121, 1526), whereas petitioner was driving a black Ford van (R. 1201).

Accordingly, there is more than enough evidence of record to demonstrate that the defense of alibi was viable in this case. The district court's surmise that "[o]bviously, had an adequate alibi defense been available, it would have been developed"[8/] simply is not supported by the record and should not have been accepted by the court of appeals. We believe that neither of the courts below would have made this assumption had the record been described to them in any significant detail.

B.

Other indications of record make it impossible to indulge any such benign

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8/ Certiorari petition Appendix D at 37.

explanation of trial counsel's lack of pretrial preparation, failure to develop any coherent theory of defense, and refusal to pursue upon the receipt of new evidence petitioner's consistent claim that he did not commit the homicide for which he stands condemned to die. Counsel's handling of the whole case was inexcusably slipshod.

For example, as the opinion below concedes, the jury in this case was never instructed on the elements of first degree murder under Louisiana law before finding petitioner guilty of that offense.[9/] It is hard to imagine any duty of defense counsel in a criminal trial more rudimentary than reviewing the trial judge's charge to determine that, at the very minimum, the jury will be told what it needs to find

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9/ Certiorari petition Appendix C at 27; 653 F.2d at 950.

in order to convict. Yet defense counsel ignored that duty here.[10/]

Nowhere is defense counsel's laxity more apparent than at the penalty phase, which from beginning to end lasted 50 minutes. R. 18, 1680, 1701. Counsel called only petitioner's wife and two stepdaughters, each of whom was questioned in the most cursory fashion. R. 1684-94.

10/ The court of appeals reasoned that the deficient charge was inconsequential because the jury was subsequently instructed as to the aggravating circumstances at the penalty phase. See certiorari petition Appendix C at 28-29; 653 F.2d at 951-52. But, having just convicted petitioner of a crime described as murder with (undefined) aggravating circumstances, the jury could hardly then do an about-face and find that no aggravating circumstances existed. To do so would have required a complete repudiation of the verdict of guilt rendered only a few hours earlier that same day. The penalty phase deliberations thus became little more than a rubber-stamping of the guilt determination -- a determination which itself had been based upon a deficient charge.

There was no effort to delve into petitioner's life history in any depth, and no effort to call non-family witnesses. Astonishingly, not once did defense counsel even mention the fact that petitioner had never before been convicted of a crime of violence. See R. 1663-64.

C.

We will not burden the Court with lengthy argumentation that under Townsend v. Sain, 372 U.S. 293 (1963), and its progeny, petitioner was entitled to a habeas corpus hearing on the issue of ineffective assistance of counsel. Obviously, petitioner was entitled to such a hearing. Our purpose has been to demonstrate, as the petition does not -- and as the papers submitted to the courts below did not -- that the claim has a very substantial basis in fact. This Court should either grant

certiorari to hear it or, alternatively, summarily reverse and remand to the district court with instructions to conduct an evidentiary hearing.

II

THE LOUISIANA SUPREME COURT'S POLICY OF ENGAGING IN PROPORTIONALITY REVIEW OF DEATH CASES ONLY ON A DISTRICT-WIDE RATHER THAN A STATEWIDE BASIS -- A POLICY CURRENTLY UNDER REVIEW BY THE EN BANC FIFTH CIRCUIT IN WILLIAMS v. BLACKBURN -- VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

On appeal of petitioner's case, the Louisiana Supreme Court followed its policy of engaging in proportionality review of the sentence only on a district-wide rather than a statewide basis. We respectfully submit that this review falls far short of that envisioned by this Court in Gregg v. Georgia, 428 U.S. 153, 204-07 (1976)(plurality opinion); id. at 211-12, 223-24

(concurring opinion of Justice White); Proffitt v. Florida, 428 U.S. 242, 258-60 (1976)(plurality opinion); and Jurek v. Texas, 428 U.S. 262, 276 (1976)(plurality opinion). See also Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980)(plurality opinion).

The opinion of the court of appeals surmised that the Louisiana Supreme Court does not really limit its review to cases from the same judicial district.[11/] But that assumption is simply incorrect: the Louisiana Supreme Court has never once claimed that it engages in state-wide proportionality review, and one Justice of that court has expressly stated -- without contradiction by his colleagues -- that the court does not do so. State v. Prejean, 379 So. 2d 240, 250 (La. 1980) (Dennis,

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11/ Certiorari petition Appendix C at 31; 653 F.2d at 953.

J., dissenting from the denial of rehearing).

Although the rehearing petition filed on Mr. Baldwin's behalf did not persuade a majority of Fifth Circuit judges that rehearing en banc should be granted to consider the constitutionality of Louisiana's scheme of district-wide proportionality review, the Fifth Circuit has subsequently granted rehearing en banc on the identical issue in another case. Williams v. Blackburn, 649 F.2d 1019, 1021 (5th Cir. 1981), rehearing en banc granted, 661 F.2d 1020 (5th Cir. 1981). Williams was argued before the en banc court on January 13, 1982, and a decision may be expected shortly. Accordingly, this Court should at a minimum hold Mr. Baldwin's certiorari petition in abeyance pending the Fifth Circuit's en banc resolution of

Williams. If the en banc Fifth Circuit rules in favor of Williams on the proportionality review issue, the appropriate disposition would be a remand to the court of appeals for reconsideration in light of Williams. If it rules against Williams, this Court should consider the en banc Williams opinion before deciding whether the issue warrants further review.

CONCLUSION

Petitioner today faces imminent execution despite the absence of (i) a conscientious effort by his attorneys to substantiate his claim that he is innocent; (ii) a determination by a properly instructed jury that he is guilty of first degree murder; (iii) a review by a Louisiana appellate court concluding that his case, when compared with other first degree murder cases throughout the State of

Louisiana, merits imposition of that State's most extreme criminal sanction; and (iv) a federal habeas corpus proceeding in which the facts relevant to petitioner's constitutional claims were accurately presented to and understood by the courts below.

This Court has only recently reiterated its view that "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed. 2d 1, 9 (1982). Its insistence upon "extraordinary measures" to guarantee fairness and reliability in death cases, Eddings v. Oklahoma, supra, 71 L.Ed. 2d at 13 (concurring opinion of Justice O'Connor), applies both to the determination that the defendant is guilty and to the determination that he deserves to die. Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

The execution of Timothy George Baldwin would make a mockery of these principles. Accordingly, the Court should either (i) grant certiorari to decide petitioner's claims, (ii) summarily reverse and remand to the district court with instructions to conduct an evidentiary hearing on the issue of ineffective assistance of counsel, or (iii) hold the certiorari petition in abeyance pending the

Fifth Circuit's en banc resolution of the proportionality review issue in Williams v. Blackburn.

Respectfully submitted,

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